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New York (State) Reports.

REPORTS

OF

PRACTICE CASES,

DETERMINED

IN THE

COURTS OF THE STATE OF NEW-YORK:

WITH

A DIGEST OF ALL POINTS OF PRACTICE EMBRACED IN THE STANDARD
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BY

AUSTIN ABBOTT,

COUNSELOR AT LAW.

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TABLE

OF THE

CASES REPORTED IN VOLUME X., NEW SERIES.

A.	PAGE	PAGE	
Aden, Bildersee <i>v.</i>	163	Cassidy <i>v.</i> City of Brooklyn.....	297
American National Bank, Van Allen <i>v.</i>	326	Central Presbyterian Church, Congregation Beth Elohim <i>v.</i>	484
Aspinwall, Ferris <i>v.</i>	137	Chamboret <i>v.</i> Cagney.....	31
		Charter Oak Ins. Co., Carroll <i>v.</i>	166
		Cheesebrough <i>v.</i> Tompkins.....	379
		City of Brooklyn, Cassidy <i>v.</i>	297
		—, Gray <i>v.</i>	186
Bailey <i>v.</i> Belmont.....	270	City of Elmira, Thurston <i>v.</i>	119
Baker <i>v.</i> Stephens.....	1	Clark, Bininger <i>v.</i>	264
Bates, Stockwell <i>v.</i>	381	Cochran, Ripley <i>v.</i>	52
Battell <i>v.</i> Burrill	97	Congregation Beth Elohim <i>v.</i>	
Belden, Hackett <i>v.</i>	123	Central Presbyterian Church.....	484
Belmont, Bailey <i>v.</i>	270	Congress & Empire Spring Co. <i>v.</i> High Rock Congress Spring.....	349
Bildersee <i>v.</i> Aden.....	163	Coulter, McGuckin <i>v.</i>	128
Bininger <i>v.</i> Clark.....	264	Cryden, Gregory <i>v.</i>	289
Blossom, People <i>ex rel.</i> <i>v.</i> Nel- son.....	200		
Bolles <i>v.</i> Duff.....	399		
Bowen, Sexaner <i>v.</i>	335	D.	
Burrill, Battell <i>v.</i>	97	Dabney <i>v.</i> Stevens.....	39
		Dale <i>v.</i> Jacobs.....	382
		Dayton, Albany & Susquehanna R. R. Co. <i>v.</i>	182
Cagney, Chamboret <i>v.</i>	31	Dibble <i>v.</i> Camp.....	92
Camp, Dibble <i>v.</i>	92	Diers, Society for the Reforma-	
Carpenter <i>v.</i> Keating.....	223		
Carroll <i>v.</i> Charter Oak Ins. Co.	166		

	PAGE		PAGE
tion of Juvenile Delinquents v.....	216	Congress & Empire Spring Co. v.....	349
Dinsmore, Lienan v.....	209	Hodnett v. Smith.....	86
Dreyer v. Rauch.....	343	Hoffman, Lefferts v..... <i>note</i> , 2	
Duff, Bolles v.....	399	Hudson River R. R. Co., Priest —, Matter of.....	60
— v. Wardell.....	416	Hughes v. Mercantile Mutual Ins. Co.....	37
E.			
Eager, Matter of.....	229	J.	
Elwood v. Gardner.....	238	Jacobs, Dale v.....	382
Erie Railway Co. v. Ramsey..	109	Johnson v. Whitman.....	111
European Petroleum Co., Linds- ley v.....	107	K.	
F.			
Faris v. Peck.....	55	Keating, Carpenter v.....	223
Farmers' Joint Stock Ins. Co., Owen v..... <i>note</i> , 166		Kolgers v. Guardian Life Ins. Co.....	176
Ferris v. Aspinwall.....	137	L.	
Fisk v. Union Pacific R. R. Co.....	457	Lambert, Read v.....	428
Fogerty, Hatch v.....	147	Lambden, Todd v.....	383
Ford, Ford v.....	74	Lefferts v. Hoffman..... <i>note</i> , 2	
Fordred v. Seaman's Savings Bank.....	425	Leslie v. Leslie.....	64
G.			
Gardner, Elwood v.....	238	Lienan v. Dinsmore.....	209
Giles v. Solomon..... <i>note</i> , 97		Lindsley v. European Petro- leum Co.....	107
Glen's Falls Ins. Co., Town- send v.....	277	Longwell, People <i>ex rel.</i> v. Mc- Master.....	132
Gray v. City of Brooklyn....	186	M.	
Gregory v. Cryder.....	289	Matthews v. Wood.....	328
Guardian Life Ins. Co., Kol- gers v.....	176	Matter of — See name of the party in this table.	
H.			
Hackett v. Belden.....	123	McCormack, Matter of	234
Hatch v. Fogerty.....	147	McGuckin v. Coulter.....	128
Henderson v. Spofford.....	140	McMaster, People <i>ex rel.</i> Long- well v.....	132
High Rock Congress Spring,		Mercantile Mutual Ins. Co., Hughes v.....	37
		Metropolitan Board of Health v. Schmades.....	205
		Miller v. White.....	385

TABLE OF CASES.

V

	PAGE		PAGE
Miller, Wilson <i>v.</i>	143	Society for the Reformation of Juvenile Delinquents <i>v.</i>	216
Morning Side Park Case.....	338	Diers	216
N.		Solhinger, Shears <i>v.</i>	287
Nelson, People <i>ex rel.</i> Blossom <i>v.</i>	200	Solomon, Giles <i>v.</i>	97
O.		Smith, Hodnett <i>v.</i>	86
O'Leary <i>v.</i> Walter.....	439	Smith, Premo <i>v.</i>	90
Owen <i>v.</i> Farmers' Joint Stock Ins. Co.....	note, 166	Spofford, Henderson <i>v.</i>	140
P.		Stearns, Woodward <i>v.</i>	395
Paddon <i>v.</i> Taylor.....	370	Stephens, Baker <i>v.</i>	1
Peck, Faris <i>v.</i>	55	Stevens, Dabney <i>v.</i>	39
People <i>ex rel.</i> Blossom <i>v.</i> Nel- son.....	200	Stockwell <i>v.</i> Bates.....	381
People, <i>ex rel.</i> Longwell <i>v.</i> Mc- Master.....	132	T.	
People <i>v.</i> Tinsdale.....	374	Taylor, Paddon <i>v.</i>	370
Priest <i>v.</i> Hudson River R. R. Co.....	60	Taylor Will Case.....	300
Premo <i>v.</i> Smith.....	90	Thomas, Matter of.....	114
R.		Thurston <i>v.</i> City of Elmira.....	119
Ramsey, Erie Railway Co. <i>v.</i>	109	Tinsdale, People <i>v.</i>	374
Rauch, Dreyer <i>v.</i>	343	Todd <i>v.</i> Lambden.....	383
Read <i>v.</i> Lambert.....	428	Tompkins, Cheesebrough <i>v.</i>	379
Ripley <i>v.</i> Cochran.....	52	Townsend <i>v.</i> Glen's Falls Ins. Co.....	277
Rosenberg, Matter of.....	450	U.	
Rules of Court of Appeals as to Attorneys.....	note, 147	Union Pacific R. R. Co., Fisk <i>v.</i>	457
S		V.	
Sampson <i>v.</i> Wood.....	note, 223	Van Alen <i>v.</i> American Na- tional Bank.....	236
Schmades, Metropolitan Board of Health <i>v.</i>	205	W.	
Scofield <i>v.</i> Whitelegge.....	104	Walter, O'Leary, <i>v.</i>	439
Seaman's Savings Bank, For- dred <i>v.</i>	425	Wardell, Duff <i>v.</i>	84
Sexaner <i>v.</i> Bowen.....	335	White, Miller <i>v.</i>	385
Shears <i>v.</i> Solhinger.....	287	Whitelegge, Scofield <i>v.</i>	104
		Whitman, Johnson <i>v.</i>	111
		Wilks, Matter of.....	note, 234
		Wilson <i>v.</i> Mills	143
		Wood, Mathews <i>v.</i>	328
		Wood, Sampson <i>v.</i>	note, 223
		Woodward <i>v.</i> Stearns.....	395

INDEX

TO THE

CASES REPORTED IN VOLUME X., NEW SERIES.

	PAGE
<i>Abatement and revival</i> —of action as to deceased partner.....	123
<i>Action</i> . Form of, against broker.....	428
— though originally against partners, may proceed against legal representative of deceased, after satisfaction of judgment as to survivor.....	123
— time of commencing, for commissions on negotiating contract.....	395
— against municipal corporation for torts of officers may be taken away by statute.....	186
— for pilotage, on refusal of services, to be brought by pilot, not by board of commissioners.....	143
— when lies for injunction to stay proceedings.....	223
— when lies to stay surrogate's proceedings	note, 223
<i>Affidavit</i> —for supplementary proceedings, form of.....	1
— to obtain interpleader, requisites of.....	343
<i>Agent</i> . Liability of one who gives reason to suppose he has given authority.....	52
<i>Alimony</i> —court may grant temporary, to wife, pending suit against her.....	64
<i>Appearance</i> —before county judge, required by town bonding acts, must be in person.....	132
<i>Appeal</i> —from an order sustaining or overruling demurrer, does not lie to court of appeals.....	137
— to court of appeals from an order denying a motion to set aside reference.....	289
— costs of two appeals not allowable, when heard together on same set of papers in supreme court.....	381
— contrary held in New York superior court.....	328
— to court of appeals, usual decree of foreclosure final for.....	399
— general term cannot dismiss, because order appealed from is discretionary.....	416
— does not lie from default.....	1

	PAGE
<i>Appeal</i> —does not lie from judgment on award	93
— does not lie from order refusing to strike out part of pleading	37
— from refusal to vacate arrest, how determined	55
— lies from order vacating <i>ex parte</i> order of discontinuance	64
— not dismissed for breach of stipulation	1
<i>Arbitration</i> —under statute, not reviewed by appeal from judgment, but only by motion	92
<i>Arrest</i> —allowed for fraud in taking transfer of stock; motion for discharge, how determined	55
— Facts extrinsic to cause of action, relied on as a ground of arrest, must not be alleged in complaint	238
— Where facts constituting ground of and cause of action are identical, defendant need not move before trial to set aside order of arrest	238
— Where facts constituting ground of, and cause of action, are identical, proper course of defendant	238
— ordered, of banker disregarding instructions to remit	111
<i>Assault</i> —action brought against master for, when committed by a servant in his employment, barred in two years	60
<i>Assessments</i> —Act of 1870, in regard to, not retroactive	229
— principle on which made, under act of 1858, not subject of review	229
— for work not performed, an irregularity	229
— under act of 1870, not to be vacated for including an unlawful charge, but may be modified	note, 234
— Legal irregularities in, under act of 1870	234
— not a lien on common property, but only on separate lots	119
— collection of, not in general to be restrained by injunction	119
— not invalid because one of the assessors is not a freeholder, or the contractor has given no bond	119
<i>Assessment and award</i> —objections to commissioners' report must be made before confirmation	338
<i>Attachment</i> —how issued in New York common pleas; not vacated for failure to file papers	395
— of State funds, not allowable to be issued in action against State treasurer, joined for claim against State alone	381
— for contempt of an order to pay money, not allowed	74
— form of	1
— order setting aside, supersedes undertaking given to obtain discharge of property	163
<i>Attorney</i> —Liability of, for professional misconduct; inconsistent interests	147
— Rules as to admission to the bar	147
<i>Award</i> —merits of, not reviewed on appeal from judgment thereon	92
— Objections to commissioners' report must be made before confirmation	338

B.

<i>Bankruptcy</i> . Powers of State courts to discharge from imprisonment	287
— Discharge from imprisonment applied for and obtained since passage of act of Congress, must comply with its provisions,	287

	PAGE
<i>Benevolent corporations.</i> Justice's consent and approbation of certificate of organization under general law, not conclusive on secretary of state or court	200
<i>Board of health</i> —powers of, to make ordinances	205
<i>Broker's action</i> for commisions	395
<i>Broker</i> —form of action against, and measpre of damages on conversion by	428
<i>Burden of proof</i> —in action against trustees of corporation	39
<i>Brooklyn charter.</i> Suits against city	186

C.

<i>Case</i> —not to contain exceptions taken by respondent	39
<i>Cause of action</i> —against one who has allowed another to appear as his agent	52
<i>Charter.</i> Acceptance of, raises no implied contract with individuals	186
<i>Clerk</i> —of justices' court in Brooklyn must be appointed by common council	297
<i>Collection</i> —of drafts by express companies, negligence must be proved	209
<i>Commissioners</i> —of award and assessment. Objections to their report must be made before confirmation	338
<i>Common Council</i> —of Brooklyn includes the mayor	297
— appointment of clerk of justice's court in Brooklyn	297
<i>Compensation</i> —for performance of work before time specified, not allowed in public contracts:	229
— for lands injured by railroad company	182
<i>Complaint</i> —for wrongful detention of personal property, must allege ownership in plaintiff:	104
— on contract, alleging fraud, and summons for relief;—nature of action, and defendant's course	238
<i>Consent and approbation</i> —of justice, in certificate of benevolent society organized under general law, not conclusive on secretary of state or court	200
— to sale of infants' lands by general guardian, on order from county court, when authorized	97
<i>Constitutional law</i> —as to pilotage	140
<i>Consideration</i> —surrender of promissory note for money loaned, a good consideration for a sale to <i>bona fide</i> purchaser	370
<i>Contempt</i> —of an order to pay a sum of money, how punishable ..	74
<i>Corporation</i> —powers of agents and officers; notice of want of authority, and mode of ratification	39
— contract, with individual seals of trustees	484
<i>Costs</i> —of appeal from order may include expense of printing ..	109
— not refused because defendant is executor	84
— on hearing of exceptions at general term	84
— of two appeals, when heard together on same set of papers, not allowed in supreme court	331
— Contrary held in New York superior court	328
— in surrogate's court	300
<i>Counterfeits</i> —distinction between, and forgeries	300
<i>Counter-claim.</i> In trespass against a mortgagee of chattels, damages for plaintiff's secreting them, or for failure of title, cannot be counter-claimed	31

	PAGE
<i>County court</i> —not authorized to grant order for sale of infants' lands.....	97
<i>Court</i> —not concluded by justice's consent, &c., in certificate of benevolent society organized under general law.....	200
— has no power to render proceedings by or before a referee valid, after notice of election to end reference.....	288
<i>Court of appeals</i> —will presume motion to strike out evidence granted, if necessary to sustain decision.....	379
— cannot review a demurrer until after final judgment.....	137
<i>Cruelty to animals</i> —rules respecting liability for.....	374

D.

<i>Damages</i> —measure of, for lands taken by railroad company.....	182
— in action by vendor against purchaser in default.....	484
<i>Default</i> —in not appearing after informal notice.....	1
<i>Demand before suit</i> —not necessary in action for wrongful detention of personal property.....	104
<i>Demurrer</i> —appeal from an order overruling, does not lie to court of appeals.....	137
— for misjoinder of parties plaintiff.....	119
<i>Disbursements</i> —for printing, included with costs of appeal from order.....	109
<i>Discharge</i> —of insolvent debtor from imprisonment once denied, not allowed on second petition.....	114
— from execution; when jurisdiction is acquired.....	450
— requisites of petition.....	450
<i>Discontinuance</i> — <i>ex parte</i> , on payment of costs, is not allowed where defendant has obtained any right in the suit.....	64
<i>District courts</i> —have power to compel interpleader.....	343
<i>Divorce</i> . Alimony granted to wife defendant; right of husband to discontinue.....	64
<i>Docket</i> . A new docket of a mechanic's lien will be presumed, if an order continuing it is shown.....	123
<i>Draft</i> —when given for collection to another, drawer must prove negligence or non-payment.....	209
— upon savings bank, before deposit of funds, effect of.....	425
<i>Dramatic</i> —entertainments, what are included by.....	216

E.

<i>Errors</i> —of subordinate courts not reviewed in proper exercise of equity powers.....	119
<i>Evidence</i> . In action to recover wife's property, levied for husband's debt, what must be shown.....	439
— of corporate debt in suit against stockholder or trustee.....	385
— of filing report.....	385
— rules of, as to forgeries; proving handwriting by experts, and by photographs. Declarations of decedent after <i>factum</i> of will.....	300
— motion to strike out, court of appeals will presume granted, if necessary to sustain decision.....	379
— to prove waiver by insurance company, of forfeiture.....	176
— of witnessed specialty must be by subscribing witness	86

	PAGE
<i>Examination of party</i> —before trial, allowed, though he be a non-resident	383
<i>Exceptions</i> —taken by respondent, not to be inserted in case	39
<i>Execution</i> —discharge from; requisites of petition	450
— discharge from; when jurisdiction is acquired	450
<i>Express Company</i> —not liable as common carrier, but as bailee for hire, in taking draft for collection	209

F.

<i>Filing papers</i> —omission of, not necessarily ground for vacating attachment	395
<i>Foreclosure</i> . Child born after suit brought, and before judgment	note, 97
— usual decree of, final for appeal to court of appeals	399
— of mortgage absolute on face, when completed	399
<i>Forgeries</i> —distinction between, and counterfeits	300
<i>Forms</i> —for substituted service under act of 1853; for supplementary proceedings, and for attachment	1
<i>Fraud</i> —committed without the jurisdiction, a ground of arrest	111
— in contract, implied by subsequent insolvency	382
— in taking transfer of stock, a cause of action and ground of arrest	55
<i>Fraudulent sale</i> —when title is passed by	370
<i>Fraudulent conveyances</i> —by husband to wife	439

G.

<i>General term</i> —cannot dismiss an appeal because order is discretionary	416
<i>Good-will</i> —protected in equity at suit of partner, even after assignment in bankruptcy and receivership	264

I.

<i>Indictment</i> —for cruelty to animals	374
<i>Individual liability</i> of trustees of corporation for neglect to report; nature of, and burden of proof	39
<i>Infants</i> —cannot give consent to sale of lands through mother and general guardian, upon an order from county court	97
<i>Injunction</i> —not issued to restrain assessment	119
— on motion to dissolve, new affidavits may be read by plaintiff in answer to new matter set up as explanatory, or in nature of confession and avoidance by defendant	216
— to restrain A. Bininger Clark from infringing upon use of name of A. Bininger & Co	264
— when allowed to stay proceedings	223
— when granted to stay proceedings	note, 223
— when issued to restrain infringement of trademark	349
<i>Implied contract</i> —from accepting municipal charter, is between city and State	186
<i>Imprisoned debtor</i> . Second petition cannot review grounds of denial of first	114
<i>Imprisonment</i> —for contempt of an order to pay a sum of money, the proper proceeding	74

	PAGE
<i>Irregularities</i> —in assessments, under act of 1870	234
<i>Insolvency</i> —held to imply fraud in previous contract.....	382
— effect of Bankrupt Act on State laws.....	287
— judgment of want of justice and fairness of petitioner in, <i>res adjudicata</i> on second petition for discharge.....	114
<i>Insurance</i> —waiver of condition in policy.....	166
<i>Insurance company</i> —may waive forfeiture, and its rules.....	176
<i>Interpleader</i> —district courts have power to compel.....	343

J.

<i>Joiner</i> —of parties not within limitation of statute for removal from State court to United States circuit court, not permitted to withdraw cause from United States court.....	457
— of several corporations defendants on removal of cause from State court to United States circuit court, when not necessary	457
— of a State treasurer in action against State alone, not allowable, so as to issue attachment of State funds.....	381
<i>Judgment</i> —against corporation, admissible against stockholder and trustee.....	385
— Omission to annex summons, not fatal.....	385
— that absolute assignment is a mortgage, when not a bar.....	399
<i>Jurisdiction</i> —in civil and criminal cases, grant of, does not confer power to appoint clerks.....	297
— in discharge from execution, when acquired	450
— in discharge from execution, when want of, may be pleaded.....	450
— in matters of pilotage, quarantine, &c	143
— to order arrest of a debtor, resident abroad, for fraud committed abroad.....	111
<i>Justice</i> —has not power to appoint clerk.....	297

L.

<i>Levy</i> —on wife's property for husband's debt.....	439
<i>Limitations</i> —in action against master for assault committed by servant in his employment	60

M.

<i>Manufacturing corporations</i> —liability of, on drafts by unauthorized officers.....	39
<i>Married woman</i> —question of fraud on part of, in furnishing husband capital for business ostensibly his, one for jury.....	439
— intention of laws respecting.....	439
<i>Master</i> —action against, for assault committed by servant in his employment, barred in two years.....	60
<i>Mechanic's lien</i> . Cannot be discharged on summary application, pending a reference for foreclosure.....	123
— motion to discharge on ground of non-continuance, must aver facts proving it.....	123
<i>Mortgage</i> —absolute on face, when foreclosed	399
— absolute on face, limitation of time of redemption.....	399

	PAGE
<i>Motion</i> —to strike out evidence, court of appeals will presume granted, if necessary to sustain decision.....	379
— to correct report of commissioners awarding damages, in local improvement, not granted after confirmation.....	338
— to vacate arrest, rules for determining.....	55
<i>Municipal corporation</i> —remedy against, for torts of officers, may be taken away by statute.....	186

N.

<i>Names</i> —use of, and right to exclusive use.....	264
<i>New York</i> —proceedings for local improvement in.....	338
<i>Notice</i> —of corporate officer's authority.....	39
— of decision overruling preliminary objection and requiring appearance, need not be formal.....	1

O.

<i>Orders</i> —court has always power to vacate, when irregular or without jurisdiction.....	450
— general term may set aside, and rehear the case.....	416

P.

<i>Parol waiver</i> —of clause requiring waiver to be in writing.....	166
<i>Parties</i> —to foreclosure; unborn child.....	note, 97
— Partner, even after bankruptcy, and appointment of receiver, may sue to protect good will and use of firm name.....	264
— Who may sue when trustee is delinquent.....	399
<i>Penalty</i> —for act done beyond territorial jurisdiction.....	143
<i>Photographs</i> —of handwriting; condition of admissibility as evidence.....	300
<i>Pilots</i> —may claim pilotage fees for services beyond State jurisdiction.....	143
<i>Pilotage laws</i> —of the State not superseded by Act of Congress, June 25, 1866, as amended February 25, 1867.....	140
<i>Pleadings</i> . Rules under the Code.....	428
— in action for wrongful detention of personal property.....	104
— verification of.....	335
<i>Precept</i> —for committal to prison for contempt of an order to pay a sum of money, need not in terms admit to prison limits.....	74
<i>Probate of will</i> —contested on ground of genuineness, order of proof.....	300
— Examination by contestant of private papers of deceased.....	300
— Order of proof by proponents.....	300

Q.

<i>Question of fact</i> —authority to insurance clerk, when is.....	176
---	-----

R.

<i>Railroads</i> —assessment of damages to residue of lands for injury by part taken.....	183
---	-----

	PAGE
<i>Receiver</i> —may be appointed, when other receivers have previously been appointed.....	270
— of judgment creditors, when a proper party plaintiff.....	399
<i>Redemption</i> —from foreclosure by child born after suit brought, and before judgment.....	note, 97
— of mortgage, absolute limitation of time of.....	399
<i>Reference</i> . No decision can be made, and report is irregular, if referees do not meet.....	277
— form of election to end.....	289
— Delivery of papers to referee after final submission, does not extend time for making report.....	289
— after notice of election to end, proceedings by or before referee a nullity.....	289
— after notice of election to end, court has no power to render proceedings by or before a referee, valid.....	289
<i>Registration</i> —of trademark, in patent office.....	349
<i>Religious Corporation</i> . Contracts for sale of real estate.....	484
<i>Removal</i> —from State court to United States circuit court; how question on averment of defense under United States Constitution, &c., must be settled.....	457
— if application for, from State court to United States circuit court, is regular, affidavits cannot be read in opposition, and the court has no discretion.....	457
<i>Report of referees</i> —procured by the separate application of the attorney, set aside.....	277
<i>Res adjudicata</i> —in proceedings in insolvency.....	114
<i>Rescission</i> —of subscriptions for unlawful purpose, when allowed.....	270
<i>Review</i> —of errors of subordinate courts, never undertaken in proper exercise of equity powers.....	119
<i>Revival</i> —of action, by or against partners, by legal representative of deceased partner.....	123

S.

<i>Sale</i> —of infant's lands on an order from county court, not valid.....	97
<i>Savings Bank</i> —effect of draft upon, before deposit of funds.....	425
<i>Secretary of State</i> —not concluded by justice's consent and approbation in certificate of benevolent society organized under general law.....	200
<i>Servant</i> —action for assault by.....	60
— of railroad company, not exonerated from charge of cruelty, by his orders.....	874
<i>Service</i> —by mail and posting, under act of 1853, how made.....	1
— of summons, on absent defendant, by mail, &c.....	note, 2
<i>Society</i> —for lending money, not a benevolent society within meaning of general statute.....	200
<i>State</i> —in action against, alone, the State treasurer cannot be joined so as to issue attachment of State funds.....	381
<i>Statutes</i> —construction of several, passed same day. What are inconsistent.....	205
<i>Stay of proceedings</i> —may be granted till plaintiff produces evidence fraudulently withheld.....	90
<i>Stock</i> —fraud in taking transfer of, a cause of action and ground of arrest.....	55

	PAGE
<i>Subscription</i> —made here, to assist revolution elsewhere, lawful	270
— may be rescinded when purpose is abandoned, though unlawful	270
<i>Subject of the action</i> —meaning of, in provisions of the Code as to counter-claim	31
<i>Substituted service</i> —under act of 1853, how made	1
<i>Summons</i> —for relief, and complaint on contract, alleging fraud, nature of action, and defendant's course	238
— served on absentee, by mail, &c	<i>note</i> , 2
— to examine non-resident party before trial	383
— omission of, from judgment roll, not fatal	385

T.

<i>Taxes</i> —all payers of, under town bonding acts, must be counted	132
<i>Tender</i> —of deed, objections to, must be specified if remediable	484
<i>Testimony</i> —of experts in handwriting; conditions of admissibility; cannot be based on photographs	300
<i>Title</i> —when passed by fraudulent sale	370
<i>Trademarks</i> —remedy for infringement of. Right of exclusive use	349
— doctrine of, as applied to names	264
<i>Trial</i> —by referees, and duty of referees to meet and consult	277
— right to open and close	107
“ <i>Transaction</i> ”— meaning of, in provisions of Code as to counter-claim	31

U.

<i>Undertaking</i> —given to obtain discharge from levy, falls if attachment is set aside	163
---	-----

V.

<i>Verification</i> —must be to effect that pleading is true to the knowledge of affiant	335
--	-----

W.

<i>Waiver</i> —of conditions in policy of insurance	166, 176
<i>Will</i> —rules of evidence, on probate	300
<i>Witness</i> —terms of charge as to credibility of	166
— Proof of absence of subscribing witness to let in secondary proof	86



ABBOTT'S PRACTICE REPORTS. NEW-YORK.

NEW SERIES.

BAKER *against* STEPHENS.

New York Common Pleas; General Term, January, 1869.

Again, December, 1870.

APPEAL.—NOTICE OF DECISION.—DISMISSAL OF APPEAL.—STRIKING OUT ANSWER FOR CONTEMPT.—

SUBSTITUTED SERVICE.—ATTACHMENT FOR CONTEMPT.

A decision rendered by a court of record, upon default of the appellant, is not appealable.

Actual notice of a decision overruling a preliminary objection to an order to show cause, and requiring the party to appear on a further day named, is sufficient notice to appear then, although no formal order be made and served.

An appeal will not be dismissed on the ground that the appellant has violated a stipulation by which he obtained a stay of proceedings pending the appeal.

Form of affidavit for examination supplementary to judgment,—*Held, sufficient.*

Forms of proceeding by substituted service under *Laws of 1853*, p. N. S.—X—1

Baker *v.* Stephens.

974, at defendant's *place of business* where he evades personal service, and his *residence* is not known; and forms of proof of such service, and of attachment,—*Held*, sufficient.*

The judge to whom the application for an order for substituted service is made, being satisfied that all requirements of the statute, necessary to confer jurisdiction, have been complied with, may make the order; and having been made, it cannot be questioned collaterally, as for instance upon a motion to vacate an attachment which was issued thereon, and which recites all the necessary jurisdictional facts.

It is competent for the court, on appeal in such case, to take cognizance of the fact that the conditions necessary to confer jurisdiction recited in the attachment really did exist, though not set forth in the moving affidavits.

An attachment for contempt being regular upon its face, and containing all the recitals essential to confer jurisdiction, the party moving to set it aside upon the ground of defects in the proceedings upon which it was founded, or for a failure to serve an affidavit of the facts charged as constituting the contempt, must show affirmatively the defect or omission, or, by affidavit in support of his motion, must create such a presumption as will throw upon the other party the *onus* of proving that his proceedings are regular.

* In *LEFFERTS v. HARRIS* (*Supreme Court, First District, At Chambers*, 1866), it was *Held*, that the summons for the commencement of an action of an equitable nature, under the Code of Procedure, may, by virtue of the former practice in chancery, be served by publication, on an absent defendant, who has property within the State.

The action was brought by William C. Lefferts and William T. Hoffman against Edwin T. Harris, for the dissolution of a partnership. It appeared by the plaintiff's papers that the parties formed a copartnership in the city of New York, in 1865, "for the purpose of carrying on a general military and naval banking business, real estate, mining, and legal business, purchasing and collecting soldiers' and sailors' claims, prosecuting actions in the United States court of claims, also of engaging in the purchase and sale of a certain patent right for the manufacture and distillery of spirits, whiskies, and alcohol, upon a new and improved principle," &c.; and that the defendant, after the lapse of a year, and before the term of the copartnership had expired, left his residence in this State and obtained a residence in the State of Michigan, and there formed a new relation as copartner in a firm in Detroit, in violation of his articles here, and abandoned the New York firm. By this action, the plaintiffs sought to dissolve their copartnership, appoint a receiver of the partnership property, and enjoin

Baker *v.* Stephens.

Charles E. Baker, general agent and treasurer of the proprietors of the *Independent*, a newspaper, sued in his own name (as trustee of an express trust, in the contract

the defendant from interfering with the property or affairs of the partnership pending the action.

The affidavits on which (together with summons and complaint and exhibits) the application was made, were two affidavits, by different persons, that they had respectively searched duly and diligently for defendant at his late lodgings and place of business in the city of New York, designating it, for the purpose of serving the summons, and were informed by various persons, designating some of them, that defendant had some weeks previously left the city with his family, and was now in Detroit, Michigan, at a hotel designated, and that deponent was unable to serve the summons. Also a deputy sheriff's return that defendant was not found, &c. Also an affidavit of plaintiff's attorney, containing the following allegations:

I. That deponent is attorney for the plaintiffs, in the above entitled action.

II. That a summons has been issued in the action, against the defendants therein.

III. That the defendant is not a resident of this State, nor can he be found therein, but that he lives in the city of Detroit, in the State of Michigan.

IV. That this action is brought to dissolve a copartnership now existing between said plaintiffs and defendant, under the style of Lefferts, Hoffman & Co., by reason of defendant's gross violation of the articles of said copartnership, the approaching insolvency of the defendant, and the bad faith of said defendant.

V. That the defendant has property within this State, viz: One-third interest in the partnership property of Lefferts, Hoffman & Co., No. 40 Park Row, New York city.

[As to necessity of other allegations under act of 1863, see note on p. 8.]

The plaintiffs applied to Mr. Justice SUTHERLAND, at chambers, for an order authorizing service of the summons by publication, but he held that he had no authority under the Code of Procedure to grant the order, on the ground that jurisdiction could not, under that Code, be obtained in equity suits, *in personam*, where personal service could not be effected in the State. He therefore refused to grant the order then sought to be obtained, but added that if any authority for such an order could be found under the old chancery practice of this

Baker *v.* Stephens.

in question), to recover the price of advertising done for the defendant, Philetus Stephens.

The cause was before the general term in January 1869, on plaintiff's motions to dismiss three appeals,

State or of England, that he would grant an order of publication to effect the end sought by plaintiffs in the first application.

In pursuance of this leave to renew the application, the following points were made by counsel :

Chauncey B. Ripley, for the plaintiffs.—I. The Revised Statutes of 1829 provide for the service of subpoena in cases of non-resident defendants, and other proceedings against such non-resident defendants, in a court of chancery (2 *Rev. Stat.*, 186, § 122, &c.).

II. The Revised Statutes of 1829 were amended by the *Laws of 1842*, p. 363. "An act in relation to proceedings in the court of chancery against non-resident defendants," &c. (§ 2, subd. 2) inserting explicitly "or if he be a resident of some other of the United States," &c.

III. This act applies to *all* chancery suits (*Laws of 1842*, 364, § 4). "This act shall apply to suits instituted for the partition of lands, as well as to all other suits instituted in the court of chancery, &c." "and shall be applicable to unknown owners in partition suits" (6 *How. Pr.*, 158).

IV. The New York supreme court has the same powers and exercises the same jurisdiction that the court of chancery did in 1829 and 1842 (*Laws of 1847*, p. 323, § 16).

V. The question of jurisdiction, and the mode of publication in serving a non-resident, are decided in *Close v. Van Husen* (6 *How. Pr.*, 157).

VI. The same rules are laid down in *Barb. Ch. Pr.*, pp. 52, 53.

VII. The English law is full and positive on this point (*Daniel's Ch. Pl. & Pr.* 524; 4 & 5 *Will. IV.*, c. 82) "apply to *all suits*" (*Daniel's Ch.*, 522; *Lingan v. Henderson*, 1 *Bland*, 246; 1 *Rand.*, 300; 1 *Smith's Ch. Pr.*, 185; *Dodd v. Webber*, 2 *Beav.*, 502; *Lloyd v. Lord Trimbleston*, 1 *Moll.*, 244; *Irwin v. Carleton*, 1 *Id.*, 245; *Nolan v. Nolan*, 1 *Id.*, 244; *Waltham v. Goodyear*, 31 *Eng. L. & Eq.*, 365; *Strong v. Moore*, 21 *Id.*, 427; *Whitmore v. Ryan*, 4 *Hare*, 612; 10 *Jurist*, 368; *Wigram Ch.*; 1 *Dan.*, 566; *Hoffman's Ch. Pr.*, 180, &c.; *Eyre v. Dwyer*, 6 *Irish Eq.*, 79; *Allen v. Allen*, 11 *How. Pr.*, 277; *Collins v. Campfield*, 9 *Id.*, 519; *Laws of 1853*, p. 974; *Piers v. Piers*, *Sau. & Sc. R.* 89).

William Barney, also for plaintiffs.—I. Under the English chancery practice, the rules as to process being the same for original process (summons) and mesne process,—*Bouv. Law Dic.*, "Process II."—

Baker *v.* Stephens.

taken by defendant. Two were dismissed ; and the cause was before the general term in December, 1870, for the determination of the third appeal.

I. *January, 1869.* Motions to dismiss appeals. The

(subpoenas and all interlocutory proceedings through sheriffs, &c.), it is established, that " where the subpoena cannot be served by ordinary methods, extraordinary means may be resorted to ; and such service is to be warranted by a previous order of the court " (1 *Barb. Ch.*, 52).

II. Such extraordinary service is not only possible in equity practice, but the method of the practice is specifically pointed out. It is by application *ex parte* to court by motion on affidavit, rehearsing circumstances for an order to make any such extraordinary service, whatever it may be, good service (*Id.*, vol. 1., p. 53).

III. And more definitely it is decided that " personal service out of the jurisdiction of process, to hear judgment or show cause, is good service " (*Daniel's Ch. Pl. & Pr.*, 518, also note ; *Nolan v. Nolan*, 1 *Moll.*, 244).

IV. Service on an absent defendant out of jurisdiction is good (*Daniel's Pl. & Pr.*, 524). These principles are now recognized, embodied and set forth in the following statutes: 11 *William IV.*, ch. 33 ; and 4 & 5 *Id.*, ch. 82. These statutes apply, first, to service within the jurisdiction ; secondly, to service without the jurisdiction.

V. And, more specifically, " where defendant is out of the jurisdiction in any action or suit whatever, service may be ordered by the court, and the process may be personally served out of the jurisdiction (*Daniel's Pl. & Pr.*, 525).

VI. Granting an order for publication in such cases is a matter of course (*Lingan v. Henderson*, 1 *Bland Md. Ch.*, 246).

VII. The court of chancery is empowered, upon special motion of plaintiff, to direct service of any substituted process (1 *Smith Ch. Pr.*, 195 ; *Dodd v. Webber*, 2 *Beav.*, 502).

VIII. In the case of a foreign defendant served in France, service was taken as a matter of course, and the method only considered (Lloyd v. Lord Trimbleston, 1 *Moll.*, 244 ; *Irwin v. Carleton*, 1 *Id.*, 245).

IX. It is definitely stated, that service out of the jurisdiction is good (*Nolan v. Nolan*, 1 *Moll.*, 244 ; *Waltham v. Goodyear*, 31 *Eng. L. & Eq.*, 365 ; *Strong v. Moore*, 21 *Id.*, 427).

X. The court can order such service to be deemed good, as it pleases, in any case (10 *Jurist*, 368), even though neither domicil nor property be within jurisdiction.

XI. The court is to prescribe mode of service (1 *Daniel's Ch. Pr.*, 566).

Baker *v.* Stephens.

proceedings on which these motions arose were as follows :

After answer served, plaintiff obtained an order that defendant appear before trial, to be examined as a witness on the part of plaintiff. This order was obtained on an affidavit containing the following allegations.

[*Title and venue.*]

Chauncey B. Ripley, being duly sworn, says :

- I. That he is plaintiff's attorney herein.
- II. That this cause is at issue in this court.
- III. That this is an action on contract, brought by plaintiff to recover of defendant for services in adver-

XII. "The provisions of the Revised Statutes of New York are abrogated by the passage of the Code" (3 *Rev. Stat.*, ch. 1, art. 4, page 269, 5 ed.). We must, therefore, refer to the chancery practice.

XIII. As to the application of the foregoing authorities and principles, see *Hoffman's Ch. Pr.*, 190. They are properly applied.

SUTHERLAND, J., granted the order, which was in the following form :

[*Title of the court and cause.*]

It appearing to my satisfaction, by the affidavits of William P. Treet, Peter Woods, and Chauncey B. Ripley, and the certificate of David McGonigal, Deputy Sheriff, that the defendant in the above entitled action, Edwin T. Harris, cannot, after due diligence, be found in this State ;

That the plaintiffs have a cause of action against said defendant ;

And that said defendant, Edwin T. Harris, is not a resident of this State, but has property therein ;

Ordered, I. That the summons in the above entitled action be served on the said Harris, by publishing the same in the *Albany Evening Journal*, and in the *New York World*, once a week for six weeks.

II. That a copy of the summons and complaint in this action be forthwith deposited in the post office, directed to the said Harris, at Blindbury's Hotel, Detroit, Michigan.

JOS. SUTHERLAND, Justice.

Dated, New York, January 18, 1866.

Baker *v.* Stephens.

tising the card of Dr. J. Stephens & Co. at defendant's request, and for the benefit of said defendant.

IV. That plaintiff desires to examine his adversary, said Philetus Stephens, defendant, as to matters material to the issue.

V. That said defendant's place of business is 840 Broadway, New York City.

[*Jurat.*]

[*Signature.*]

The order, and the summons issued therewith, were in the following form :

[*Title of the court and cause.*] At a special term [&c.]

On reading and filing the affidavit of Chauncey B. Ripley, annexed, and on motion of said Chauncey B. Ripley, plaintiff's attorney, it is *Ordered* :

I. That the said Philetus Stephens, defendant herein, appear before me at the chambers of this court, on Monday, the 17th of February instant, at ten o'clock in the forenoon of that day, to be examined as a witness in the above entitled action, on the part of plaintiff.

II. That a copy of the annexed summons be served on said defendant Stephens.

III. That a copy of this order and the annexed affidavit be served on defendant's attorney.

[*Signature of Judge.*]

[*Title of the court and cause.*] Summons.

To Philetus Stephens, defendant :

You are hereby summoned and required personally to appear before me, at 10 o'clock A. M. on the 17th day of February inst., at the City Hall, at the chambers of said court, to give your testimony, as a party before the trial, in an action between Charles E. Baker, plaintiff, and Philetus Stephens, defendant, pursuant to the provisions of the Code of Procedure, § 391, and the acts amending the same.

For a failure to attend you will be punished according to law.

[*Date.*]

[*Signature of Judge.*]

Baker *v.* Stephens.

The affidavit on which the order was obtained, and the order, and notice that plaintiff's attorney would attend at the time named in the order, to examine defendant, were served on defendant's attorney.

After unsuccessful efforts to serve the summons on the defendant Stephens, personally, plaintiff applied for an order allowing substituted service, under the act of 1853. The allegations of the affidavits on which this application was made, were as follows:*

Morris Pollock, being duly sworn, says:—That he is clerk for the plaintiff's attorney herein; that, on February 12, 1868, the annexed summons and a copy thereof were placed in his hands for service on the defendant Philetus Stephens; that at about eleven o'clock, A. M., he went to the office of said Stephens, 840 Broadway, the only known place where said Stephens can be found; that he found a young man in attendance who told him he must state the nature of his business before he could see Mr. Stephens, and that, if he came there a hundred times, he could not see Mr. Stephens, unless he so stated his business; deponent stated that he had a message that could only be delivered to said Stephens personally, but said young man refused to give him any satisfaction, and deponent is satisfied that said Stephens keeps himself concealed with intent to avoid service, and that personal service cannot be made.

Edward C. Ripley, being duly sworn, says:—That he is managing clerk in the office of plaintiff's attor-

* Where this proceeding is taken for service of *summons for the commencement of the action*, the affidavits ought also, according to the case of *Gere v. Gundlach*, 57 *Barb.*, 13, to contain statements showing the nature of the action, and that the defendant was not a sailor or soldier, &c., unless that fact might be inferred from what is stated. The proper form of such affidavits will be found in *Abbott's Forms of Practice and Pleading*, vol. 1, Nos. 129, 130, and the recital for the order, in No. 131.

Baker *v.* Stephens.

ney in this action ; that, on February 12, 1868, immediately after the return of Morris Pollock, he went to the office of said Stephens for the purpose of serving said summons, but found the office locked ; that, on February 13, instant, he went again, and found a young man in charge, who "did not know when said Stephens would be in,"—saying, that "he believed he had gone to a funeral to-day,"—"that he might be in to-morrow and might not,"—that he "didn't know where Mr. Stephens lived,"—"that he could attend to any matter of business."

Deponent further says, that said Stephens' only address in the New York Directory is 840 Broadway, and that deponent is satisfied, not only from his present knowledge but also from former experience, that said Stephens keeps himself concealed to avoid service, and that personal service of the annexed summons cannot be made.

Patrick McCaffrey, being duly sworn, says:—That he is deputy sheriff of said county ; that, on February 13, instant, soon after the return of Edward C. Ripley, he went to the office of Philetus Stephens, 840 Broadway, for the purpose of serving said Stephens with annexed summons, and found the office of said Stephens open, but no one in attendance ; that, after staying there a short time a young gentleman came down stairs and informed him that said Stephens had been there and gone away ; that, on February 14, 1868, at, or about half-past nine o'clock, A. M., he again called and found said office locked up ; that he called the same day about eleven o'clock, and inquired of the young man in attendance if Mr. Stephens was in, to which said young man replied, that he didn't know any such person and couldn't tell him anything about it ; that he inquired if a message were left for said Stephens, if it would reach him, to which he made about the same reply as above, and refused to give deponent any satis-

Baker v. Stephens.

faction, and deponent is satisfied that personal service cannot be made on said Stephens, and that he keeps himself concealed, with intent to avoid the same.

Upon these affidavits an order for substituted service was made, in the following form :

[*Title of the court and cause.*]

It appearing to my satisfaction, by the affidavits of Patrick McCaffrey, deputy sheriff of this county, Morris Pollock, and Edward C. Ripley, that the summons, a copy of which is hereto annexed, has been delivered to said McCaffrey, Pollock, and Ripley, to be served, and that the defendant, Philetus Stephens, has a place of business in said city ; that said McCaffrey, Pollock, and Ripley, have made proper and diligent efforts to serve the same personally upon him, and that said defendant evades such service, so that the same cannot be personally served ;

Now, on motion of Chauncey R. Ripley, attorney for plaintiff, it is ordered :

That the service of the said summons be made by leaving a copy thereof, and a witness fee of fifty cents, at 840 Broadway, the only known place where said Stephens can be communicated with, with some person of proper age, if admittance can be obtained and such proper person found who will receive the same, and, if admittance cannot be obtained, or any such proper person found who will receive the same, then that the said service be made by affixing the same to the outer or other door of said place of business, and by putting another copy thereof, with a fee of fifty cents, properly folded and enveloped, and directed to the person to be served, at 840 Broadway, New York city, into the post-office of said city, and paying the postage thereon.

[*Date.*]

[*Signature of judge.*]

Proof of making the substituted service was presented in the following affidavit indorsed upon the summons :

Baker *v.* Stephens.

[Venue.]

Edward C. Ripley, being duly sworn, says:—That on February 15, 1868, at 840 Broadway, in said city, between the hours of 12 and 1 P. M., he served a copy of the summons, of which a copy is annexed, and a copy of the original order hereto annexed, upon a young man, to the best of deponent's judgment, eighteen years of age, who was in charge of the office of the defendant Stephens, by delivering to, and leaving with said young man, the same, and at the same time and place, informing him that they were for Mr. Stephens, and paying him a fee of fifty cents, and informing him that said fee was also for said Stephens. After said young man had retained said papers and fee a short space of time, he threw them violently upon the floor, declaring that said Stephens should never see them—that he wasn't a going to serve papers on Stephens.

Deponent further says, that on the same day, between the hours of 1 and 3 P. M., he deposited in the general post-office, New York city, another copy of said summons, sealed in an envelope, directed to "Mr. Philetus Stephens, 840 Broadway, New York City," and paid the postage thereon.

Defendant was called, on the return of the order, before Judge **BRADY**, but did not appear. His attorney was present, but refused to answer on his behalf.

Plaintiff's counsel took an order to show cause why defendant's answer should not be stricken out, and plaintiff have judgment as for want of an answer.

On the return of this order, Judge **BRADY** reserved the case to consider the sufficiency of the substituted service; and on a subsequent day filed the following opinion :

BRADY, J.—I think the affidavit, on which the order to show cause why the defendant's answer should not

Baker *v.* Stephens.

be stricken out, contains all that is necessary to authorize the exercise of the power so to order. The defendant was duly served, in accordance with the provisions of the act of 1853 (*Laws of 1853*, p. 974), with the summons to appear and be examined as a witness, and he has not either obeyed the summons or complied with the order of the court requiring him to appear and be examined. If he does not appear on March 16, 1868, at 10 A. M., or on such day as may be further named by this court, his answer must be stricken out, and the plaintiff allowed to take judgment.

This decision or opinion was read by the counsel for both parties, together, in examining the papers in the hands of the clerk at the chambers of the court.

An order striking out the answer, and directing judgment, was accordingly filed by plaintiff, and judgment entered.

From the order, and also from the judgment, the defendant appealed; and plaintiff now moved to dismiss both appeals.

A third appeal, taken by defendant in the same cause, and the dismissal of which was also moved for, arose out of the following proceeding :

Upon the judgment which plaintiff had recovered, he commenced supplementary proceedings to examine defendant respecting his property.

The order for examination of the debtor was obtained on the following affidavit :

[*Title of the court and cause; and venue.*]

Edward C. Ripley, being duly sworn, says:—That he is managing clerk for the attorney of the above named plaintiff; that judgment was recovered in this action against the above named defendant, Philetus Stephens, in the said court of common pleas, on March

Baker *v.* Stephens.

16, 1868, for two hundred and thirty-six dollars and two cents, damages and costs; that said judgment, exclusive of costs, was for more than twenty-five dollars; that the judgment roll was filed in the office of the said court of common pleas; and that on March 18, 1868, a transcript of said judgment was duly filed and docketed in the office of the clerk of New York county; and that an execution upon said judgment against the property of the defendant, Philetus Stephens, was, on March 18, 1868, duly issued to the sheriff of the city and county of New York, where said defendant then had and still has a place of business; that the sheriff has returned said execution wholly unsatisfied, and that said judgment remains wholly unpaid.*

Upon this affidavit the usual order for defendant to appear for examination, and forbidding transfers of his property, was made. Plaintiff, not being able to make personal service of this order, applied for an order allowing substituted service under the act of 1853, as in the case of the order for examination before judgment. The allegations of the affidavits on which the application was made were as follows:

Morris Pollock, being duly sworn, says:—That he is clerk for plaintiff's attorney herein, and has been for six months last past. That on May 25, 1868, the annexed order and a copy thereof for service, were placed in the hands of deponent, who immediately repaired to 840 Broadway, in said city, the only known place of business or residence of said defendant; but that said defendant's door was locked, and a notice on the door directed persons to apply next door for medicines or information; that deponent called next door,

* The New York superior court have held such an affidavit insufficient, upon the rather slender objection that it did not affirmatively appear that the transcript was filed *before* the execution issued (*Hawes v. Barr*, 7 *Robt.*, 452).

Baker *v.* Stephens.

and was informed that Mr. Stephens was not in, but would probably be in next morning; that deponent called again next morning, and found the said office again locked, and the same notice on the door; and on inquiring, was again informed that Mr. Stevens would probably be in next morning; that deponent has heretofore in this action attempted to serve a summons for examination of defendant before trial, but was unable to do so, and was told by the young man in charge of said Stephens' office, that if he came there a hundred times he could not see defendant, unless he stated the nature of his business; and that on the affidavits of Edward C. Ripley, Patrick McCaffrey, late deputy sheriff, and deponent, an order for substituted service was granted by the Hon. JOHN R. BRADY, which said order and affidavits were duly filed February 21, 1868. Deponent further says, that he believes said Stephens keeps himself concealed with intent to avoid service, and that personal service of the annexed order in supplementary proceedings cannot be made.

Edward C. Ripley, being duly sworn, says:—That he is managing clerk in the office of plaintiff's attorney herein; that he has read the foregoing affidavit of Morris Pollock, and believes it to be true; that immediately after the return of said Pollock, deponent repaired to 840 Broadway, the office of said Stephens, and, finding the door locked, went into the adjoining office, where he was directed to go for information by a notice on said Stephens' door; that deponent was informed that said Stephens would not be in again to-day, but would probably be down in the morning; but that deponent's informant could attend to any business of Mr. Stephens'. Deponent further says, that said Stephens carries on a business through the mails, and has at 840 Broadway an office about seven feet square, furnished with one small desk and one chair; that deponent, Morris Pollock, and late Deputy

Baker *v.* Stephens.

Sheriff McCaffrey, in this action, have made thorough and persistent efforts to serve said Stephens, but have never been able to do so; that the only person ever found in said Stephens' office, is a young man who insults every one who goes there, and always refuses information of said Stephens; that deponent is satisfied that said Stephens keeps himself concealed to avoid service, and that personal service of the annexed order in supplementary proceedings cannot be made.

P. C. Lynch, being duly sworn, says:—That on the 26th instant, after the return of E. C. Ripley from the office of said Philetus Stephens, the annexed order and a copy thereof for service, were delivered to deponent for service, and that since that time deponent has made diligent efforts to serve the same, but has been unable so to do; that deponent having inquired of the person to whom he was directed by notice on said Stephens' door, he was informed that if deponent had any message to leave for said Stephens, he would deliver the same to him; but on deponent's asking for a description of said Stephens, said person in charge informed him that he never saw said Stephens; and deponent further says, that he believes said Stephens keeps himself concealed with intent to avoid service, and that personal service of the annexed order cannot be made.

Sheriff's Certificate.—I hereby certify that said Lynch was a deputy sheriff of this county at the time mentioned above.

[*Date.*]

[*Signature of Sheriff.*]

Edward C. Ripley, being duly sworn, says:—That said Stephens' only address in the New York Directory is 840 Broadway, and that to all deponent's inquiries, and those of Morris Pollock and others, the person in charge of said Stephens' office has refused to give any information regarding the residence of said

Baker *v.* Stephens.

Stephens, and that deponent is unable to find any other address of said Stephens.

Upon the foregoing affidavits, Judge BRADY granted an order for substituted service, which was in the following form :

[*Title of the court and cause.*]

It appearing to my satisfaction, by the affidavits of P. C. Lynch, deputy sheriff of this county, Morris Pollock, and Edward C. Ripley, that the order in supplementary proceedings, a copy of which is hereto annexed, has been delivered to said Lynch, Pollock, and Ripley, to be served, and that the defendant Philetus Stephens has a place of business at 840 Broadway, in said city; that said Lynch, Pollock, and Ripley, have made proper and diligent efforts to serve the same personally upon him, and that said defendant evades such service, so that the same cannot be personally served;

Now, on motion of Chauncey B. Ripley, counsel for plaintiff, it is ordered that the service of the said order be made by leaving a copy thereof at 840 Broadway, the only known place where said Stephens can be communicated with, with some person of proper age, if admittance can be obtained, and such proper person found who will receive the same; and, if admittance cannot be obtained, or any such proper person found who will receive the same, then that the said service be made by affixing the same to the outer or other door of said place of business, and by putting another copy thereof, properly folded and enveloped, and directed to the person to be served at 840 Broadway, New York City, into the post-office in said city, and paying the postage thereon.

The proof of the service pursuant to this order was presented as follows :

Baker *v.* Stephens.

Edward C. Ripley, being duly sworn, says:—That on May 30, 1868, at 840 Broadway, in said city, he served copies of the foregoing order for substituted service, affidavits, and order in supplementary proceedings, on a young lady, apparently eighteen years of age, who said that she was authorized to receive messages for said Stephens, by delivering to and leaving with her the same, and that she stated to deponent before and after such service, that she would hand the same to said Stephens.

Morris Pollock, being duly sworn, says:—That on May 30, 1868, he deposited in the general post-office in said city copies of the foregoing order for substituted service, affidavits, and order in supplementary proceedings, properly folded and enveloped, and directed to Philetus Stephens, 840 Broadway, New York City, care of Dr. J. Stephens & Co., and paid the postage thereon.

Indorsed upon the order for examination, was also a memorandum or affidavit of plaintiff's counsel, that defendant was duly called on June 3, and did not appear.

Upon these papers the following attachment was issued.

[*Title of court and cause.*]

The people of the State of New York to the sheriff of the city and county of New York, greeting:

Whereas, a judgment was duly given and recovered March 16, 1868, in an action depending in the court of common pleas for the city and county of New York, wherein Charles E. Baker is plaintiff, and Philetus Stephens is defendant, against the above named defendant, Philetus Stephens, for two hundred and thirty-six dollars and two cents, damages and costs;

And whereas, the judgment roll in said action was

Baker *v.* Stephens.

on said day filed in the office of the clerk of said court of common pleas ;

And whereas, a transcript of said judgment, duly certified, was, on March 18, 1868, duly filed in the office of the clerk of the city and county of New York ;

And whereas, an execution upon said judgment against the property of defendant, was, on March 18, 1868, duly issued to the sheriff of the city and county of New York, where said defendant then had and still has a place of business ;

And whereas, said sheriff has returned said execution wholly unsatisfied, and the said judgment remains wholly unpaid ;

And whereas, on May 25, 1868, and subsequent to the return of said execution, the Hon. JOHN R. BRADY, one of the judges of our court of common pleas for the city and county of New York, being cognizant of the foregoing facts, and upon due proof thereof, did, at the instance of the said plaintiff, issue an order, signed by him with his name and his said official title, in which he did order and require the said Philetus Stephens to appear before him at the chambers of said court, at the City Hall, New York city, May 30, 1868, at eleven o'clock in the forenoon, to make discovery on oath concerning his property ;

And whereas, on May 29, 1868, it having been shown by affidavits that said order for the examination of said defendant, Philetus Stephens, could not, after due diligence, be personally served on him the said defendant, the said Hon. JOHN R. BRADY, judge of the court of common pleas for the city and county of New York, did, at the instance of the plaintiff, extend the time in said order for the examination of said defendant, by changing the return day to June 3, 1868, at eleven o'clock in the forenoon, and issue an order signed by him with his name and his said official title, in which

Baker *v.* Stephens.

he did order that the said order requiring said defendant to make discovery on oath concerning his property, be served according to the provisions of chapter 511 of the *Laws of 1853*, entitled "An Act to facilitate the service of process in certain cases,"

And whereas, the said order for the examination of said defendant, together with the said order for substituted service, and the affidavits upon which the same was granted, were, on May 30, 1868, at 840 Broadway, in the city of New York, and by mail, duly served, and affidavits of each service duly filed according to the statute above mentioned;

And whereas, the said Philetus Stephens, did, on June 3, 1868, at eleven o'clock in the forenoon, and for the space of thirty-five minutes thereafter, fail to appear at the chambers of the said court of common pleas aforesaid, and was guilty of a disobedience of the said order of the said judge in failing to appear at the time and place by said order required, and became liable to punishment therefor as for a contempt of court, pursuant to section 302 of the Code of Procedure, and under the general power of said court to punish offenses calculated to impair its dignity and efficiency:

Now, therefore, you are commanded that you attach the said Philetus Stephens and have his body before the Hon. GEORGE C. BARRETT, one of the judges of our said court, at the chambers of said court, [G. C. B.] City Hall, New York city, on the 9th day of [G. C. B.] June, twelfth (12) twenty-fifth (25th) day of June, 1868, at ten o'clock in the forenoon, to answer for his misconduct, in failing as aforesaid to appear at the chambers of said court, at the time in said order required.

And have you then and there this writ.

Witness, the Hon. GEORGE C. BARRETT, judge of the

Baker *v.* Stephens.

said court of common pleas, at the City Hall in the city of New York, this 5th day of June, 1868.

GEO. C. BARRETT, J. C. C. P.

CHAUNCEY B. RIPLEY, Plaintiff's Att'y,
39 Park Row, N. Y. City.

By special order.

[*Seal.*] NATHANIEL JARVIS, Jr., Clerk.

[*Attachment.*]

The within writ of attachment is hereby allowed.
Admit to bail in the sum of three hundred dollars.

N. Y. City Hall, June 5, 1868.

GEO. C. BARRETT,
J. C. C. P.

By special order.

NATHANIEL JARVIS Jr., Clerk.

CHAUNCEY B. RIPLEY, Plaintiff's Att'y,
39 Park Row, N. Y.

Filed June 25, 1868.

On the return of the attachment before Judge BARRETT, defendant moved to vacate it, and the motion was denied. Defendant appealed from the denial; and obtained an order to show cause why the proceedings on the attachment should not be vacated, and staying plaintiff's proceedings meanwhile.

Subsequently, July 8, 1868, the attorneys entered into a stipulation that the argument of the appeal be waived, and all the questions involved in the appeal be submitted on printed points before the 20th inst.; defendant's points to be submitted to plaintiff before the 15th inst.

Upon these proceedings, and on affidavit that defendant had not served or submitted points, plaintiff moved to dismiss the appeal from the order refusing to vacate the attachment.

Baker *v.* Stephens.

Chauncey B. Ripley, for the motion.—*First*, as to the appeal from the judgment. I. The decision was on default in a court of record, and therefore not appealable. For no point can be raised in a court of appellate jurisdiction which was not argued in the court below, and against which decision or judgment no exception was taken at the time.

II. The appellant was in contempt, and was so adjudged by the court, and his answer was properly stricken out pursuant to section 394 of the Code. “If a party refuse to attend and testify, as in the last four sections provided he may be punished for contempt, and his complaint, answer or reply stricken out.” *Code*, §§ 394 and 391. And from an order adjudging a witness before trial to be in contempt, *there is no appeal*. *People ex rel. Valiente v. Dyckman*, 24 *How. Pr.*, 222.

III. Judgment in this case was rendered on the 16th of last March, nearly a year since, and although the notice of appeal was served on the 13th of April last, no undertaking for the security of costs has ever been filed with the clerk, or served on plaintiff’s attorney.

IV. The defendant’s answer was stricken out for contempt, and judgment ordered for plaintiff as for want of an answer; the defendant therefore had no answer. *No appeal lies from a judgment for want of an answer* (*Pope v. Dinsmore*, 8 *Abb. Pr.*, 429). The remedy, if any, is a motion to open the judgment. (*Stewart v. Morton*, 8 *Abb. Pr.*, 429, note).

V. The case proposed by the appellant was not served nor submitted to the respondent, until the 26th December, ultimo, affording the latter but six days, all holidays, and one of them New Year’s day, to prepare and serve amendments and settle the case. And respondent’s attorney was notified by appellant’s attorney that he should disregard any service of amendments whatever. To entitle the appellant to review any questions, either of fact or of law, arising upon the trial or

Baker *v.* Stephens.

decision, a case containing exceptions *regularly settled and filed*, is *indispensable* (Connolly *v.* Connolly, 16 *How. Pr.*, 224). And, unless a copy of the case be served on the opposite party, within ten days after written notice of the entry of judgment, his right to make a case is lost (Rules 34 and 35, Supreme Court).

VI. The appeal should be dismissed, because the case contains no exceptions; nor does the record show that any were taken. Hunt *v.* Bloomer, 13 *N. Y.*, 341; Colie *v.* Brown, *Code R. N. S.*, 416; Cheesbrough *v.* Agate, 26 *Barb.*, 603.

Second. The appeal from the order directing judgment should be dismissed for the same reasons; and because the order was made on default, and the appellant was in contempt (*Code*, § 394), and no appeal lies (24 *How. Pr.*, 222).

Third. As to the appeal from the refusal to vacate the attachment.

I. The stay was ordered on condition that the appeal be submitted at an early day. The stipulation has been violated by defendant. The court has jurisdiction to dismiss appeals, if either party violates a stipulation made in relation to the same, to the prejudice of the other (Townsend *v.* Masterson Stone Dressing Co., 15 *N. Y.*, 587). The court refused leave to present a case and amendments for settlement after an *unexcused delay of eight months* (Whiting *v.* Kimball, 6 *Bosw.*, 690). No notice of argument has been served in this appeal, nor has it been placed on the general term calendar for any term, though nearly ten months have elapsed since judgment; and it was stipulated to submit it on or before the 20th of July last. Where the laches have been so great, and so long continued, and unexcusably so, the appeal should be dismissed (Whiting *v.* Kimball, 6 *Bosw.*, 690). The court will interfere to prevent an attorney from being overreached by the bad faith of an adversary (Whit-

Baker *v.* Stephens.

ing *v.* Kimball, 6 *Bosw.*, 690). A stipulation by the counsel in the cause is as effectual as if by the attorney (Wilcox *v.* Woodhall, 2 *Cai.*, 250). Agreements made in the presence of the court need not be in writing, notwithstanding Rule 121 (Corning *v.* Cooper, 7 *Paige*, 587; Jewitt *v.* Albany City Bank, *Clarke*, 241). The order was *discretionary* with the judge making it, and *therefore not appealable*. The order was, indeed, one made in the course of a summary application in the action after judgment; but its object was not to question or impeach the judgment, in the sense of the cases in which an appeal from certain orders has been denied for that reason (Buffalo Savings Bank *v.* Newton, 23 *N. Y.*, 160). The order assumed the validity of the judgment. Moreover, the order was final. It rested *purely in the discretion* of the court to grant or refuse it (Buffalo Savings Bank *v.* Newton, 23 *N. Y.*, 160; Hazleton *v.* Wakeman, 3 *How. Pr.*, 357; Wakeman *v.* Price, 3 *N. Y.* [3 *Comst.*], 334). The orders made below should be affirmed (Collins *v.* Ryan, 32 *Barb.*, 647).

Andrew Blake, for the appellant.

BY THE COURT.*—BARRETT, J.—The plaintiff moves to dismiss three appeals taken by the defendant:

First. An appeal from an order striking out the defendant's answer, in consequence of his refusal to obey a previous order, requiring him to attend and submit to examination as a witness before the trial at the instance of the plaintiff;

Second. An appeal from the judgment entered upon the order striking out such answer; and,

Third. An appeal from an order denying a motion to vacate an attachment issued against the defendant as for a contempt in not obeying an order requiring him

* Present DALY, F. J., and BRADY, and BARRETT, JJ.

Baker *v.* Stephens.

to attend and submit to examination in supplementary proceedings upon the judgment thus acquired.

The first and second appeals should be dismissed, for the reason suggested upon the argument, that the order striking out the answer was granted by default.

It is true, that upon the return of the order to show cause, the defendant's counsel attended, when some objection appears to have been taken to the sufficiency of the moving affidavit. Judge BRADY took that particular question under advisement and subsequently held the affidavit to be sufficient, and required the defendant to appear on March 16, 1868, at ten A. M., to be examined, or submit to have his answer stricken out. The defendant had full notice of this direction. Although not embodied in a formal order it was read by his attorney in court, and in the presence of the plaintiff's counsel. Yet, neither the defendant nor his attorney appeared upon the day named, and the result was the entry by default of the order appealed from.

The effect of the proceeding was precisely as though, upon the return of the order to show cause, Judge BRADY had at once overruled the objection to the sufficiency of the affidavit, and had then and there adjourned the motion to March 16, after orally intimating to the defendant's counsel that unless his client appeared and submitted to examination upon the latter day, his answer should be stricken out. Thus, the matter was not finally disposed of by what had occurred previous to March 16, and while the defendant, even if he had then appeared, would not have been permitted to renew the original objection, yet he might have resisted the entry of the order upon the other grounds. The order, therefore, was not a reduction to formal shape of the decision upon the original objections. Indeed, nothing of the kind was required. But it was the granting by default of the motion itself, which (after the overruling of the original objection), had been, in effect,

Baker *v.* Stephens.

and with notice to the defendant, continued to that day.

We have, however, considered the question passed upon by Judge BRADY, and entirely concur in his views with respect to the sufficiency of the affidavits. These appeals are clearly frivolous, and as such are quite in keeping with the persistent determination to impede the administration of justice which the papers disclose.

The motion to dismiss the third appeal is without foundation, and should be denied.

If defendant has violated the stipulation on which he obtained a stay of proceedings pending such appeal, plaintiff's remedy is by motion to vacate the stay. The appeal itself is not thereby involved. As to the alleged laches, the plaintiff has the remedy in his own hands; he may notice the appeal for any term, and if the defendant fails to submit as required by the rule, he can take an affirmation.

Neither party being entirely successful, no costs should be allowed.

II. *December, 1870.* Appeal from the order refusing to vacate attachment.

Titus B. Eldridge, for the appellant.

Chauncey B. Ripley, for the respondent.—I. The court has already determined the questions. See foregoing opinions. An order to show cause was not required, because of the previous contempt.

II. The writ of attachment recites all that is necessary to confer jurisdiction.

III. Defendant's contumacy is abundantly shown.

IV. The order in question was discretionary with the judge making it; he could either grant or refuse the motion: it was, therefore, not appealable. The

Baker *v.* Stephens.

order was indeed one made in the course of a summary application in the action after judgment; but its object was not to question or impeach the judgment, in the sense of the cases in which an appeal from certain orders has been denied for that reason (Buffalo Savings Bank *v.* Newton, 23 N. Y., 160; *Code*, § 349, subd. 5). The order assumed the validity of the judgment. Moreover, the order was final. It rested purely in the discretion of the court to grant or refuse it (Buffalo Savings Bank *v.* Newton, 23 N. Y., 161; Hazleton *v.* Wakeman, 3 *How. Pr.*, 357; Wakeman *v.* Price, 3 N. Y. [3 *Comst.*], 334). The order made below should be affirmed, and the appeal dismissed.

V. The act authorizing substituted service on the defendant, in certain cases, under an order of the court, when personal service cannot be made (*Laws of 1853*, p. 974), requires that the judge who makes the order shall be *satisfied* that all the requirements of the statute have been complied with, and that all the conditions necessary to confer jurisdiction exist, and *being satisfied*, he may make the order (Supreme Court, general term, Collins *v.* Ryan, 32 *Barb.*, 647). Such judge is consequently *authorized* and *required* to decide whether or not sufficient facts are shown to *confer jurisdiction*, and if he decides *affirmatively*, the question becomes *res judicata* (Collins *v.* Ryan, 32 *Barb.*, 647). He may have misjudged and acted upon insufficient evidence, and for that reason the order may have been erroneously granted, and might be, upon proper application, set aside, *but it is not void*, and an order appealed from on the ground that there was no jurisdiction, by reason of such errors, should be affirmed, and the appeal dismissed (Collins *v.* Ryan, 32 *Barb.*, 647).

VI. It is competent for the court to observe and take cognizance of the fact, that the conditions necessary to confer jurisdiction *really did exist*, though not set

Baker *v.* Stephens.

forth in the moving affidavits (Collins *v.* Ryan, 32 *Barb.*, 650). The fact that P. C. Lynch was, at the time he made his affidavit, on which the second order for substituted service was obtained, a deputy sheriff, appears from the certificate of Sheriff O'Brien. That defendant in fact resided in the State, appears from his own admission in the testimony of Nathan Stephens. That defendant was not an officer, soldier, musician, sailor or marine, *absent and actually engaged* in the military or naval service of the United States (*Laws of 1863*, p. 388, ch. 212), is fully shown by his bond given to the sheriff, and also affidavits on which orders were obtained.

VII. It is also competent to observe and for the court to take cognizance of the fact that the defendant has never alleged or pretended that the judge at chambers assumed any facts or circumstances that did not exist, as required by the statute or its amendments, necessary to confer jurisdiction.

BY THE COURT.—DALY, F. J.—The affidavit upon which the order was made by Judge BRADY for the examination of the defendant as a judgment debtor, was amply sufficient.

The sufficiency of the proof upon which the order was made for the substituted service, was equally so. The affidavit showed that the defendant was a resident of the State; that he had a place of business at 840 Broadway—“his only known place of business or residence.” It very clearly appeared also, that he was doing all in his power to evade the service of an order for his examination as a judgment debtor, as in previous instances he had sought to evade the service upon him of the order of the court. It was distinctly shown by these affidavits, that after proper diligence and effort, in the language of the statute, he could not be found, so that the service could be made upon him

Baker *v.* Stephens.

personally. There was sufficient proof by affidavit to authorize the order; the order itself was in strict compliance with the statute, and there was proof that a copy of the order for the defendant's examination was delivered to a young lady at 840 Broadway, who said she was authorized to receive messages for the defendant, and that she would hand the paper to him; and that a copy of it had been duly sent to him by mail, in the manner required by the order. The making of the orders and the service of them are recited in the attachment, and that the affidavits of such service were duly filed as required by statute; to which is added the affidavit of C. B. Ripley, proving that the defendant did not appear at the time and place named in the order.

This was sufficient to authorize the granting of the attachment. It was in the discretion of the judge whether he would grant it in the first instance, or make an order to show cause.

He granted it at once, and very properly, for the reason, already expressed at the general term upon a former appeal, that the defendant had manifested throughout a persistent determination to impede the administration of justice, which he followed up when the attachment was served upon him, by refusing to go with the sheriff, so that he had to be taken by force. There is nothing upon this appeal to show that the affidavit or proof upon which the writ was granted was not served with the attachment. This was essential to warrant any motion to vacate the attachment upon that ground. The defendant knew what papers had been served upon him when the sheriff was compelled to take him by force, or whether any had been served, and could easily have made an affidavit of the fact, if any of the requirements of the law had not been complied with, as the foundation of the motion to vacate. It was his motion. He was the moving party, and it was essential to him to bring affirmatively to the

Baker *v.* Stephens.

knowledge of the judge below, the omission or defect on which he relied as a ground for setting aside the attachment.

The same observation may be made respecting the objection which he raises upon this appeal, that it does not appear that the affidavits of the service of the order of Judge BRADY were filed with the county clerk, as the statute requires. This was undoubtedly essential; for the statute (*Laws of 1853*, p. 914), declares that upon filing the affidavits of service with the clerk of the county where the defendant resides, the paper, &c., shall be deemed served, and that the same proceedings may be taken thereon as if it had been served upon the defendant personally.

But the attachment recites that they were filed; and what have we upon this appeal to show that they were not?

On the contrary, at the end of the affidavits in the printed case are the words, "Filed May 20, 1868"—the figures 20, probably, being a misprint for 30, the last of the affidavits having been sworn to on May 30, 1868. If they had not been filed, it was a simple matter to produce the certificate of the county clerk, or read an affidavit to the effect that they could not be found upon inquiry at his office. If this material act had been omitted, and the recital in the attachment in this particular was untrue, it was for the defendant to show it. The attachment upon its face was regular. It recited every thing that was essential to give the judge jurisdiction; and if there was any omission or defect in the proceeding upon which it was founded, or if there was a failure to serve a copy of the affidavit of the facts charged, and constituting the contempt, upon the defendant within a reasonable time to enable him to make his defense as the statute requires (2 *Rev. Stat.*, 535, § 3), it was for the defendant to show the defect or omission as a foundation for his motion to set aside the

Baker *v.* Stephens.

attachment, or by the affidavit used in support of his motion to create such a presumption as would throw upon the other party the onus of proving that the material act alleged to have been omitted had been done. But the defendant did nothing of the kind. He refused to go with the sheriff. By the aid of a confederate he resisted the execution of the process so persistently, that, in the language of the affidavit of E. C. Ripley, he had to be taken "forcibly down five pairs of stairs ;" and having thus been compelled to come before the judge, he moves to discharge the attachment without reading an affidavit or producing any thing to show that the recitals in the attachment were untrue in point of fact.

The truth probably is, that he relied upon the insufficiency of the proof upon which the order for the substituted service was made. Such an order cannot be questioned collaterally, though it may be upon a motion to set it aside, or by an appeal from it (*Collins v. Ryan*, 32 *Barb.*, 661). He made no motion to set it aside, and it is open to some question whether it could be reached by a motion to set aside the attachment; but the point is not material, as we have considered it upon the appeal, and find the affidavit upon which the order was granted to have been amply sufficient.

The order of Judge BARRETT, denying the application to set aside the attachment, should be affirmed.

VAN BRUNT and LOEW, JJ., concurred.

Order affirmed.

Chamboret *v.* Cagney.

CHAMBORET *against* CAGNEY.

New York Superior Court; General Term, February, 1871.

COUNTER-CLAIM.—CAUSE OF ACTION.—“TRANSACTION.”

The provision of section 150 (subd. 2), of the Code of Procedure, allowing defendant, in any action, to set up a counter-claim, provided it be founded on a cause of action arising out of the contract or transaction set forth in the complaint, or be *connected with the subject of the action*,—is not to be construed as authorizing a defendant, sued for damages by a trespass and conversion of chattels, to set up, as a counter-claim, his damages from the facts that plaintiff, having mortgaged the chattels to defendant, secreted a part of them, and proved to have no title to another part.

The words “subject of the action,” must be construed as referring to the facts constituting the cause of action; and in this case, neither the concealment nor the failure of title, is connected with the trespass, nor do they arise out of that transaction.

Appeal from an order sustaining a demurrer to a counter-claim in the answer.

The action was brought by Louis and Eliza Chamboret, plaintiffs and respondents, against James Cagney, defendant and appellant.

The complaint alleged as a cause of action, that on September 28, 1868, the defendant unlawfully and wrongfully took and carried away certain goods, chattels, household furniture, wearing apparel, and jewelry, the property of the plaintiffs, of the value of four thousand one hundred and seventy dollars, and that he converted and disposed of the same to his own use, to plaintiffs’ damage five thousand dollars. The answer

Chamboret *v.* Cagney.

of the defendant contained a series of specific denials, putting in issue every material allegation of the complaint, and also a counter-claim for the recovery of three hundred and fifty dollars—damages alleged to have been sustained by the defendant in the following manner :

That, in pursuance of a certain agreement made between the parties in relation to the hiring of certain premises, a certain chattel mortgage upon the goods and chattels described in the complaint was duly executed and delivered by the plaintiffs to the defendant ; that default was made in the performance of the condition contained in the mortgage ; that the defendant thereupon took possession, as he lawfully might, of so much of said property as he could find, but that the plaintiffs had, before the said taking, secreted and removed a part thereof, which could not be found ; that it was subsequently discovered that the plaintiffs had no title to a part of the property taken by the defendant, although included in the mortgage, and that the same was replevied and taken from the possession of the defendant by the true owners thereof, whereby the defendant sustained loss to the amount of three hundred and fifty dollars ; for which amount he demanded judgment against the plaintiffs.

The plaintiffs demurred to the counter-claim contained in the answer, for insufficiency in not stating facts constituting a counter-claim.

The demurrer was sustained at special term, and the defendant appealed.

Elias J. Beach, for the defendant, appellant.

J. C. Gray and J. A. Davenport, for the plaintiffs, respondents.

BY THE COURT.*—FREEDMAN, J.—The facts pleaded

* Present, BARBOUR, Ch. J., McCUNN and FREEDMAN, JJ.

Chamboret *v.* Cagney.

and relied upon by the defendant as a counter-claim, constitute a good cause of action in favor of the defendant against the plaintiffs. If greater certainty and definiteness are desired, plaintiffs' remedy is by motion, and not by demurrer. The real question, therefore, to be determined is, whether these facts can be pleaded as a counter-claim in *this* action, or whether the defendant is to be driven to a separate action.

The counter-claim is a creation of the Code, and, since 1852, includes the defenses of set-off and recoupment, as they were understood prior to that time (*Patton v. Richards*, 22 *Barb.*, 146), but is broader and more comprehensive than either. In *Boston Mills v. Eull* (6 *Abb. Pr. N. S.*, 319; *S. C.*, 37 *How. Pr.*, 299), I discussed this question fully, citing many authorities, and pointed out the distinction between a set-off, recoupment, and the counter-claim introduced by the Code.

The first essential of every counter-claim is that it shall, of itself, be a distinct cause of action in favor of the defendant pleading it, and against a plaintiff in the action, between whom a several judgment might be had, as provided by section 274. If it falls short of this, it cannot be treated as a counter-claim within the meaning of the Code (*Vassear v. Livingston*, 13 *N. Y.*, 248), although it may constitute a good defense as a set-off (*Ferreira v. Depew*, 4 *Abb. Pr.*, 131; *Duncan v. Stanton*, 30 *Barb.*, 533; *Spencer v. Babcock*, 22 *Barb.*, 326). A counter-claim differs from new matter which may be set up in the answer in this: the new matter can only be used to defeat an action; a counter-claim may be used to sustain an action. It is simply a cross action to enforce a legal or equitable set-off against the plaintiff in the action.

There are two species of counter-claims authorized by the Code: one which can be pleaded only in an

Chamboret *v.* Cagney.

action arising upon contract, and another which may be set up in *any* action.

I. In an action arising on contract the defendant may set up as a counter-claim any other cause of action arising also on contract, express or implied (*Andrews v. Artisans' Bank*, 26 *N. Y.*, 301, and *Lignot v. Redding*, 4 *E. D. Smith*, 285), and existing at the commencement of the action, against a plaintiff between whom and such defendant a several judgment might be had in the action according to the provisions of section 274, and owned by such defendant at the time of the commencement of the action (*Chambers v. Lewis*, 11 *Abb. Pr.*, 210; *Van Valen v. Lapham*, 13 *How. Pr.*, 240) and due at said time (*Rice v. O'Connor*, 10 *Abb. Pr.*, 362; *Code*, § 150, subd. 2).

II. In *any other* action any defendant may set up as a counter-claim against any one of the plaintiffs, between whom and himself a separate judgment might be had in the action as aforesaid (§ 274; *Briggs v. Briggs*, 20 *Barb.*, 477; *Newell v. Salmons*, 22 *Barb.*, 647), any claim existing in favor of such defendant against such plaintiff at the time of the commencement of the action (see *Chambers v. Lewis* and *Van Valen v. Lapham*, *supra*), and of which such defendant is the owner (*Lafarge v. Halsey*, 1 *Bosw.*, 171), *provided*, however, such claim is founded upon a cause of action arising out of the contract or transaction set forth in the complaint, *or* is connected with the subject of the action (*Code*, § 150, subd. 1).

Formerly the rule was that in an action for a tort, a counter-claim, no matter whether arising on contract or based upon another tort, could not be allowed; but this rule, it will be observed, has now been so far modified as to allow the interposition of a counter-claim in the full sense of the Code, whether arising on contract or based upon a tort, in an action for a tort, whenever such counter-claim is founded upon a cause of action

Chamboret *v.* Cagney.

arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, *or* whenever it is connected with the subject of the action. As soon as a defendant does bring himself within one or the other of these exceptions made to the general rule, his right to counter-claim is perfect, irrespective of the form of plaintiff's cause of action as set out in the complaint. This point has been expressly decided by this court, at general term, in *Xenia Bank v. Lee* (2 *Bosw.*, 694; S. C., 7 *Abb. Pr.*, 372). See, also, to same effect, *Brown v. Buckingham* (11 *Abb. Pr.*, 387; S. C., 21 *How. Pr.*, 190).

The authorities relied upon by plaintiffs in the case at bar do not establish a contrary doctrine. Upon a careful examination and analysis of them I found that every case so cited has been correctly decided, although with different result, for the reason that the defendant had failed to bring himself within at least one of the exceptions established by the Code as aforesaid. *Pattison v. Richards* (22 *Barb.*, 143) was an action for a tort; defendant counter-claimed for breach of a contract made four years prior to the commission of the alleged tort, and having no connection with the subject of the action.

Donohue v. Henry (4 *E. D. Smith*, 162) was an action for a tort, and a proposed set-off was held inadmissible because it related to other property than the one forming the subject of the action.

Barhyte v. Hughes, (33 *Barb.*, 320), was an action for an assault and battery. The defendant set up, by way of counter-claim, an assault and battery committed upon him by the plaintiff *prior* to the one described in the complaint. The court very properly held that the two occurrences were so independent of each other that they could not be disposed of in one action.

In Mayor, &c. of N. Y. v. Parker Vein Steamship Co. (21 *How. Pr.*, 289; S. C., 12 *Abb. Pr.*, 300; 8 *Bosw.*, 300)

Chamboret *v.* Cagney.

the action was on a *contract* for the payment of rent. The counter claim was for a wrongful conversion of certain fixtures. It neither arose out of the contract or transaction set forth in the complaint, nor could it be connected with the subject of the action. To obviate this difficulty the defendants made an attempt to sustain it under the second subdivision of section 150, which provides that in an action arising on contract, any other cause of action arising also on contract may be set up as a counter-claim, and argued that they had a right to waive the tort and proceed upon the legal fiction of an implied contract to pay the value. But the court held that this could not be done under the subdivision referred to ; that the counter-claim, as pleaded, was simply and purely a claim to recover damages for a tort, upon which, according to the rule laid down by the court of appeals in *Walter v. Bennett* (16 N. Y., 250), no recovery could be had as upon contract.

The only remaining question, therefore, is whether the defendant has brought himself within the letter and spirit of the first subdivision of section 150 of the Code. I have not been able to find that the precise meaning of the words "subject of the action," as used in that subdivision, has ever been judicially determined. In *Borst v. Corey* (15 N. Y., 509), the court of appeals held that the term "subject-matter" of suits, as used in section 49 (of 2 *Rev. Stat.*, 301), is synonymous with the term "cause of action," used elsewhere in the statute. Analogy, as well as sound reasoning, calls for a similar construction of the words "subject of the action." These words must be deemed to mean the subject-matter in dispute, or, to be still more explicit, the facts constituting the cause of action. In the case at bar plaintiffs brought the action for a trespass upon their property. The object of the action is to recover damages, but the subject thereof is the trespass com-

Hughes *v.* Mercantile Mutual Ins. Co.

mitted by the defendant. The counter-claim interposed by the defendant is based partly upon plaintiffs' fraudulent concealment of property not taken by the defendant, and partly upon the failure of plaintiffs' title to property which was taken. But it is not connected with the trespass upon which plaintiffs rely, nor can it be claimed that it arose out of the transaction set forth in the complaint. I concede that section 150 of the Code was enacted to simplify and expedite the administration of justice; that it is a remedial and beneficial provision, which should, at all times, receive a liberal construction, and from the start I felt strongly inclined to uphold the counter-claim. Subsequent reflection, however, has convinced me that it cannot be done without a great stretch of the meaning of the words "subject of the action" beyond their true and proper significance.

The order appealed from should be affirmed with costs.

BARBOUR, Ch. J., and McCUNN, J., concurred.

HUGHES *against* THE MERCANTILE MUTUAL INSURANCE COMPANY.

New York Common Pleas; General Term, January, 1871.

APPEALABLE ORDER.

An order made at special term, denying a motion to strike out allegations from a complaint as irrelevant, is not appealable.*

* To the same effect, in the supreme court, is *Crucible Co. v. Steel Works*, 9 *Abb. Pr. N. S.*, 195. As to the subject of appealable orders generally, see *Tauton v. Groh*, 8 *Abb. Pr. N. S.*, 385, and note, where the authorities are collected.

Hughes *v.* Mercantile Mutual Ins. Co.

Appeal from an order made at special term.

The facts sufficiently appear in the opinion of the court.

Scudder & Carter, for the defendants, appellants.

R. P. Lee, for the plaintiffs, respondents.

BY THE COURT.—LOEW, J.—This action was brought to recover the sum of five thousand dollars upon a policy of marine insurance. The defendant made a motion at special term, to strike out certain allegations contained in the complaint, as irrelevant.

The motion was denied, and the defendant thereupon brought this appeal.

If the order of the special term in this case can be reviewed at all, it must be under subdivision 3 of section 349 of the Code, which provides that an appeal may be taken to the general term from an order, when it involves the merits of the action, or some part thereof, or affects a substantial right.

It seems clear that the order appealed from, does not involve the merits of the action or any part thereof, especially as the only ground upon which the defendant asks that the matters complained of be stricken out, is their irrelevancy.

Nor can it be said that the order affects a substantial right of the defendant, within the meaning of the Code, as the denial of the motion lay entirely in the discretion of the judge at special term (*Field v. Stewart*, 8 Abb. Pr. N. S., 193).

Having came to the conclusion that the order in question is not appealable, and cannot, therefore, be reviewed by us, it will be unnecessary to consider whether the matter sought to be stricken out was irrelevant or not.

Appeal should be dismissed with costs.

ROBINSON and LARREMORE, JJ., concurred.

Dabney *v.* Stevens.

48 *Reverted,*
N.Y. 681

DABNEY *against* STEVENS.

New York Superior Court; General Term, March,
1870.

EXCEPTIONS.—CASE.—NOTICE OF OFFICER'S AUTHORITY.—EVIDENCE OF RATIFICATION.—INDIVIDUAL LIABILITY.—BURDEN OF PROOF, AGAINST TRUSTEES, OF DEBT OF CORPORATION

Unless special reason therefor be shown, an exception taken at the trial by the *respondent* must not be incorporated in the printed case on appeal.

A person dealing with an officer of a corporation whose duties are regulated by the by-laws, is chargeable with notice of his authority, and of the restrictions on it contained in them and in the act of incorporation.

Where neither the president nor the secretary of a manufacturing company, nor both combined, possessed the power to issue drafts or to negotiate drafts drawn by them in the name of the company, the company are not liable on such drafts, except on proof:

1. That a general or particular authority was conferred on them, or either of them, by the board of trustees; or,
2. That the conduct of the company was such as to create a well founded belief, that such authority had been delegated; or,
3. That the acts, although unauthorized, were subsequently ratified by the board.

Such delegation of authority or subsequent ratification may be either expressed or implied.

But a subsequent ratification will not be inferred, in the absence of proof that the board had notice of the unauthorized acts.

The liability imposed by statute upon trustees of manufacturing companies for neglecting to file an annual report, is in the nature of a penalty for misconduct in office. The penalty imposed is the debt of the corporation.

In an action to enforce such liability, the burden of proof is on the plaintiff to establish that the debt was contracted by the corporation.

Dabney *v.* Stevens.

Appeal from a judgment.

This action was brought by Charles H. Dabney, John Pierpont Morgan, and James J. Goodwin, plaintiffs and respondents, against Simon Stevens, Edward Learned, Courtlandt P. Dixon, and William L. Palmer, impleaded with Edward L. Simpson, defendants and appellants.

The action was brought against the defendants, as trustees of the Simpson Water-proof Manufacturing Company, upon an alleged liability incurred by them in consequence of their failure to make, file, and publish the annual report required by law.

The answers of the defendants as amended on the trial, put in issue all the material allegations of the complaint.

The issues were referred to a referee to hear, try, and determine the same, who found as follows:

I find as a matter of fact, that on the first day of February, 1864, the above-named defendants filed in the office of the clerk of the city and county of New York, a certificate or acknowledgment, under chapter 40 of the Laws of the State of New York, passed February 17, 1848, and the laws amendatory thereof, and also filed a duplicate of said certificate in the office of the secretary of state of New York, as required by said laws, whereby the said defendants became a corporation in fact and in name, by the name of "The Simpson Water-proof Manufacturing Company," the name stated in said certificate as the title thereof; with the usual powers, rights, and duties conferred in and by the acts aforesaid.

That in and by said certificate it was certified, among other things, that the principal part of the business of said company was to be carried on in said city and county of New York (where the chief office of the

Dabney *v.* Stevens.

said company was to be established), and also the corporate name of said company, the objects of its formation, the terms of its existence, and the number of shares of which the stock should consist, and also that the number of the trustees to manage the concerns of said company should be five, and that the names of those who should manage the concerns for the first year were Edward L. Simpson, Simon Stevens, Edward Learned, Courtlandt P. Dixon, and William L. Palmer, the defendants above named, and the persons who signed and acknowledged said certificate. That no election of trustees ever was held, and the above-named defendants, never having resigned or retired from their said trusteeship, continued to be and were the trustees of said company from its formation until after the time that the indebtedness hereinafter mentioned was incurred.

That between March 13, 1865, and June 5 in the same year, the plaintiffs in the action, at the request of the president and secretary of the said company, accepted certain *drafts drawn by said company* upon the plaintiffs for the amounts, and upon the terms and conditions specified and set forth in the complaint in this action, and especially upon the condition that the said company should place said plaintiffs "in cash funds to meet said acceptances at maturity."

That the said drafts so accepted by the said plaintiffs were duly paid by them as they became due.

That the said company put the said plaintiffs in funds to meet the said four drafts as they became due, except the draft dated June 5, 1865, drawn by said company for four thousand dollars, which became due on August 7, 1865, which last-mentioned draft the said company failed to pay, or to put the plaintiffs in funds to pay according to said agreement, except the sum of nine hundred and eighty-five dollars; and the said draft being paid by the said plaintiffs, as aforesaid, a bal-

Dabney *v.* Stevens.

ance of three thousand one hundred and fifteen dollars became and was due to them from defendants on September 1, 1865, no part of which has ever been paid to the plaintiffs.

That the said plaintiff failed to make a report within twenty days of January 1, 1865, or within twenty days of January 1, 1866, and publish the same in a newspaper published in the said city of New York, stating the amount of its capital, and the proportion actually paid in, and the amount of its existing debts, and signed by the president and a majority of its trustees, and verified by the oath of the president and secretary, and file the same in the office of the clerk of the city and county of New York, as required by the acts aforesaid.

And I find as matters of law that on September 1, 1865, the said company were justly indebted to the plaintiffs for the said sum of three thousand one hundred and fifteen dollars.

That in consequence of the failure of said company to make and publish and file the reports aforesaid required by section 12 of said act, within twenty days from January 1, 1865, and from January 1, 1866, the said defendants as such trustees became and are jointly and severally liable for all debts of said company existing at the time said reports should have been made, published, and filed respectively, or which have been contracted since that time, including the said indebtedness so due to the plaintiffs as aforesaid, and that the plaintiffs are entitled to judgment against said defendants for said sum of three thousand one hundred and fifteen dollars, with interest thereon from September 1, 1865, amounting to the sum of nine hundred and thirty-three dollars and ninety-seven cents, making in all the sum of four thousand and forty-eight dollars and ninety-seven cents, and the costs of this action.

The defendants duly excepted to the referee's find-

Dabney *v.* Stevens.

The defendants duly excepted to the referee's findings of fact and conclusions of law.

Judgment was entered in conformity with the findings of law of the referee, and the defendants, Learned, Dixon, Palmer, and Stevens, appealed.

William D. White, for the plaintiffs, respondents.

Albert Stickney, for the defendants Learned, Dixon, and Palmer.

Dudley Field, for the defendant Stevens.

BY THE COURT.—FREEDMAN, J.—The appeal papers submitted in this case have been prepared in a very objectionable form. They contain not only all the exceptions taken by the four appellants, which are very numerous, but also the exceptions of the respondents, which are equally numerous. Such practice, being calculated to mislead, imposes upon the court at general term much additional and superfluous labor. This should not be done. An exception taken during the progress of a trial by a party who finally succeeded, is improperly incorporated into the printed case, unless its insertion can be justified by the existence of a special reason therefor. I have, however, carefully examined the whole case as submitted, and the examination thus made has led me to the conclusion that the evidence was insufficient to authorize the referee to find as matters of fact that the drafts in question were drawn by the company, upon the condition, among others, that the company should place the plaintiffs in cash funds to meet their acceptances at maturity, and that the company put the plaintiffs in funds to meet the four drafts as they became due, except the draft dated June 5, 1865, for four thousand dollars, which became due on August 7, 1865, which last mentioned draft the said company failed to pay, or to put the plaintiffs in funds to pay, except the sum of nine hundred and

Dabney *v.* Stevens.

eighty-five dollars, &c. If these findings of fact cannot be sustained, it follows as a necessary consequence that the referee's conclusions of law based upon these facts must also fail.

It has been repeatedly held that the liability imposed by the statute upon trustees of manufacturing companies for neglecting to make and file an annual report, is in the nature of a penalty for misconduct in office. The penalty imposed, is the debt of the corporation (Bird *v.* Hayden, 2 *Abb. Pr. N. S.*, 61; McHarg *v.* Eastman, 35 *How. Pr.*, 205; Merchants' Bank *v.* Bliss, 35 *N. Y.*, 412; affirming 1 *Robt.*, 391; S. C., 13 *Abb. Pr.*, 225).

Plaintiffs should be held, therefore, to strict proof of their case, and the burden of proof was upon them to establish that the debt was contracted by the corporation.

A corporation aggregate, being an artificial body—an imaginary person of the law, so to speak—is, from its nature, incapable of doing any act, except through agents, to whom is given by its fundamental law, or in pursuance of it, every power of action it is capable of possessing or exercising. The acts of such agents, in order to be binding upon the corporation, must, as a general rule, be done in the line of such agency, and within the limits of the authority conferred on them (Hartford Bank *v.* Hart, 3 *Day*, 493; Wyman *v.* Hallowell and Augusta Bank, 14 *Mass.*, 62; Bellows *v.* The same, 2 *Mass.*, 31; Salem Bank *v.* Gloucester Bank, 17 *Mass.*, 1).

Thus an agreement of the president of a private corporation was held not to be evidence against the corporation, without something from which it could be inferred to have been within the scope of his authority (Pa. Supreme Court, Farmers' Bank of Bucks Co. *v.* McKee, 2 *Pa. St.*, 318).

The statute under which manufacturing corporations may be organized, places the management of their

Dabney *v.* Stevens.

property and concerns in a board of trustees to be chosen for that purpose. This power is exclusive in its character. It is one of the fundamental conditions into which the corporators enter by becoming members of the corporation, that its concerns shall be managed in the manner prescribed by the act of incorporation. From this, no essential departure can be made (*McCullough v. Moss*, 5 *Den.*, 575). The corporation, therefore, can only act by and through its trustees. The duties and powers of the president, who must be one of the trustees, and of such subordinate officers as the corporation may, by its by-laws, recognize, are generally regulated by the by-laws, and persons dealing with such president, or any such officer, are chargeable with notice of his authority, and of the limitations and restrictions upon it, contained in the act of incorporation and by-laws. There is no grant of general powers in the name by which an officer may be designated, whether he be called superintendent, or president, or general manager (*Adriance v. Roome*, 52 *Barb.*, 399).

In the case at bar, the by-laws of the Simpson Water-proof Manufacturing Company were adopted at the first meeting of the board of trustees. They provided that the officers of the company should consist of a president, a secretary, and a treasurer. The respective duties of these officers were also clearly defined. It was made the duty of the president to preside at all meetings of the stockholders and trustees, and to oversee, *under the direction of the trustees*, the manufacturing, selling, and all other operations of the company and its subordinate officers. It was made the duty of the treasurer to keep the moneys of the company, to deposit them in a bank designated by the trustees, and to disburse them *under the direction of the trustees*; but it was expressly provided that no money should be paid unless in pursuance of a vote of the trustees, and

Dabney v. Stevens.

upon checks signed by the treasurer and countersigned by the president. The duty of the secretary was defined to be, to keep all the books and papers of the company, and to record the doings of the trustees. Neither the president, therefore, nor the secretary, nor both combined, possessed the power to bind the company by making the drafts in question or negotiating with the plaintiffs for their acceptance, except upon proof that the board of trustees had conferred upon them or either of them, either a general authority to borrow on the company's credit, or a particular authority in respect to the drafts in question, or that the conduct of the company was such as to create a well-founded belief in the plaintiffs that such general or special power had been delegated, or that the acts of said agents, although unauthorized, were subsequently ratified by the board of trustees. Such delegation of prior, general or special, authority, or such subsequent ratification, might be either express or implied, but, in order to bind the company, action of some kind, in some shape or other, on the part of the trustees, was indispensably necessary.

Thus it has been held, that, whenever a corporation have a board of directors, under whose general supervision and control the business of the corporation is transacted, an agent, who attends to the daily routine of business and its management under all ordinary circumstances, has no authority, by virtue merely of his agency, to make a contract creating a general lien upon the personal property of the company, to secure money borrowed, but such contract must receive the approval of the board of directors. A general agent might be deemed vested with power to make such contracts, when necessary, in the intervals of corporate meetings, if the corporation had no other board of control but the agent; but if they have such a board, under whose control the agent was acting, such a contract by the

Dabney *v.* Stevens.

agent without their sanction is not binding (Vermont Supreme Court, 1848, *Whitwell v. Warner*, 20 *Vt.*, 425).

The evidence given on both sides in the case at bar presents no conflict of any consequence. It shows that the drafts were drawn by the secretary, simply because the president ordered him so to do, and that thereupon they were negotiated by the president for his private benefit ; that neither of the defendants, Learned, Dixon, or Palmer, had any knowledge of any of the transactions which took place between plaintiffs and the president and secretary, or either of them, prior to the commencement of this action, and that the entries regarding the said drafts and the account with the plaintiffs were not made on the books of the company, until after the expiration of a year or more after the last transaction. It also appeared that plaintiffs, who had had previous private dealings with Simon Stevens, the president, but none with the company, accepted the drafts on the faith of the personal guarantee of said Stevens, executed at the time, and without inquiry as to his authority to bind the company, and that the funds received by plaintiffs to be applied in payment of the said drafts, were furnished by Stevens for that purpose, without any knowledge on the part of his co-trustees. Stevens himself testified that he had no authority from the company to borrow money, or to give the drafts, or to make the contract with the plaintiffs, which he did make ; that he never informed his co-trustees of his transactions with the plaintiffs until some months after the maturity of the last draft ; that he originally advanced about thirty thousand dollars to the company, a great portion of which he repaid to himself out of the proceeds of these drafts. Upon this uncontested state of facts, it seems clear that, within the principles decided in the case of *Claffin v. Farmers' and Citizens' Bank* (25 *N. Y.*, 293), the acts of Presi-

Dabney *v.* Stevens.

dent Stevens were wholly unauthorized, and therefore void as against the company. In the case last cited it was held that the power conferred upon the president of a bank, by the by-laws, to certify checks did not authorize him to certify his own checks; that such act on his part was characterized as a palpable excess of authority, and it was said that any person taking the paper, was bound to inquire as to the power of the agent so to contract. The same rule was asserted in the case of *Gould v. Town of Sterling*, and *Starin v. Town of Genoa* (23 *N. Y.*, 452, 464). In *Beers v. Phoenix Glass Co.* (14 *Barb.*, 358), the facts proved warranted the inference that the transactions of the secretary, who also acted as treasurer, were directly authorized. The same remark applies to the case of the *Bank of Genesee v. Patchin Bank* (13 *N. Y.*, 316); and *Akin v. Blanchard* (32 *Barb.*, 527) was decided purely upon a question of evidence. The three last-named cases, therefore, do not aid the plaintiffs.

The evidence, in my judgment, is also insufficient to show a subsequent ratification, either express or implied. The president and secretary certainly were not competent to ratify their own unauthorized acts (Mich. Supreme Ct., *Hotchin v. Kent*, 8 *Mich.*, 526). The company, it is true, might have done so. No express vote seems to be necessary to a ratification by a corporation of the unauthorized acts of an agent. A ratification may be inferred from corporate acts, inconsistent with any other supposition than that the corporation intended to adopt and own the acts done in their name (Conn. Supreme Ct., *Howe v. Keeler*, 27 *Conn.*, 538).

Thus, a ratification may be inferred from the acquiescence of the directors or other governing body of the corporation, from the fact that, after the facts have been brought to their knowledge, they have taken no measures to show dissent; from the fact that they did

Dabney *v.* Stevens.

not question the accounts submitted; from the fact that they kept the proceeds or retained the benefits of the unauthorized acts of the agent (*Houghton v. Dodge*, 5 *Bosw.*, 326; *Woodbridge v. Proprietors of Addison*, 6 *Vt.*, 528; *Hoyt v. Thompson*, 19 *N. Y.*, 208; *Olcott v. Tioga R. R. Co.*, 27 *N. Y.*, 546; *Walworth Co. Bank v. Farmers' Loan & Trust Co.*, 16 *Wis.*, 629; *Farmers' and Citizens' Bank v. Sherman*, 6 *Bosw.*, 181).

But in all these cases the board of directors or trustees had full knowledge of the facts, and I have been unable to find a single case in which a subsequent ratification has been inferred, without proof that the board of directors or trustees had such knowledge. On the contrary, it has been held in several cases that it must be shown by the party asserting such ratification, that the resolution or acts of the corporation, or of their directors or trustees, relied on as constituting the ratification, were performed with a full knowledge of all the material facts necessary to an understanding of their rights (*Cal. Supreme Ct., Blen v. Bear River, &c. Co.*, 20 *Cal.*, 602; *Md. Ct. of Appeals, Cumberland Coal, &c. Co. v. Sherman*, 20 *Md.*, 117).

And where the ratification, by a corporation, of the unauthorized contract of their agent consisted in their having received the consideration of the contract, it was held that it must be shown that the corporation, through its proper officer or officers, knew the terms of the contract, and on what account the consideration was by them received (*Md. Ct. of Appeals, Pennsylvania, &c. Steam Nav. Co. v. Dandridge*, 8 *Gill. & J.*, 248; *Corn Exchange Bank v. Cumberland Coal Co.*, 1 *Bosw.* 437).

As the evidence in this case unmistakably shows that, with the exception of the president, none of the trustees ever had any knowledge or notice of the unauthorized transactions which took place between said

Dabney *v.* Stevens.

president and the plaintiffs, until about the commencement of this action, and that the said unauthorized acts have not in any manner been ratified by an affirmative corporate act ; the mere fact that the president, probably in extenuation of his otherwise inexcusable conduct, testified that he originally advanced about thirty thousand dollars to the company, a great portion of which he repaid to himself out of the proceeds of the drafts issued by him, cannot, in the absence of proof that the company had recognized this indebtedness, that the loan had become due, that the said president had actually given credit to the company for the proceeds received, and that the company had notice thereof, be construed into a ratification on the part of the company on the ground of acquiescence.

Finally, it seems to me equally clear that the defendants cannot be held liable upon the ground that the conduct of the corporation was such as to create a well-founded belief in the plaintiffs that the president had either a general or special power to issue and negotiate the drafts. There was no proof that the president had been in the habit of borrowing of the plaintiffs in the name of the company, and that such loans had been ratified by the company, or that it was his custom of borrowing of other persons ; that his act, in this respect, had been ratified by the company, and that these facts were known to the plaintiffs at the time they made the loan (*Martin v. Great Falls Manufacturing Co.*, 9 *N. H.*, 51). The evidence did not disclose any corporate acts from which he could have inferred such authority ; but it showed that plaintiffs, because they had neither prior dealings nor any acquaintance with the company, accepted the drafts, almost exclusively, upon the faith of the individual guarantee of the president. Nor can the plaintiffs invoke the application of the rule laid down in the *North River Bank v. Aymar* (3 *Hill*, 262), *Griswold v. Ha-*

Dabney *v.* Stevens.

ven (25 *N. Y.*, 601), *N. Y. & N. H. R. R. Co. v. Schuyler* (34 *N. Y.*, 73), namely, that where the principal has clothed his agent with power to do an act, upon the existence of some intrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. There is no evidence showing, or tending to show, that the plaintiffs have been misled by the exercise of any such apparent power. The referee erred, therefore, in finding, as matters of fact, that the drafts were drawn by the company, and that the company failed to provide plaintiffs with the necessary funds to the extent claimed by them. For this reason, the judgment cannot be sustained against the defendants. I have looked at the question whether the judgment cannot be sustained against the defendant, Simon Stevens, but have become satisfied that, as to him, it must also be reversed. He is sued as trustee, sought to be charged as a trustee, and the whole case was tried on the assumption of his liability as a trustee for misconduct in office. No attempt was made to charge him upon his guarantee. It was no part of plaintiff's cause of action, and he cannot be charged upon his guarantee, except by a change of the entire complaint. Plaintiffs should have moved for leave to amend their complaint in this respect, and given an opportunity to the defendant, Stevens, to litigate that question.

The judgment appealed from should be reversed as to all the defendants, and the order of reference vacated, and a new trial ordered, with costs to appellants, to abide the event.

MONELL and McCUNN, JJ., concurred.

Ripley *v.* Cochran.

RIPLEY *against* COCHRAN.

New York Common Pleas, General Term; November, 1870.

PARTIES.—APPARENT AGENCY.

A. went to B.'s factory and selected and ordered a log to use on a certain job, saying, "I will send a man for it," but afterwards relinquished the job, and told C., who had undertaken the same job, that he could get such a log as he wanted at B.'s; and C. went to B.'s factory, saying, "I want the log A. selected," and upon that request obtained and used it for his own benefit. *Held*, that A. was liable to B. for the use of the log.

Appeal from a judgment of a district court of the city of New York.

It appeared by the evidence on the trial, that William Cochran, defendant, contracted with David Ripley & Sons, plaintiffs, for the use of a log to be used by Cochran on a job he intended to do at Elizabeth, N. J., on Westminster Church. Cochran obtained credit through a letter of introduction and recommendation from third persons.

The log was selected and agreed upon between Cochran and plaintiffs' bookkeeper, and it was agreed that defendant was to send word when he wanted the log, and send a man for it.

About a week after the agreement, one Smith, who had the Westminster job, but did not so state to plaintiffs, called on them and said he came for Cochran's log—he wanted to see about the log Cochran had ordered. There was also testimony that the spring after the job was done, plaintiffs, on presenting the bill to Cochran,

Ripley *v.* Cochran.

were told that "Smith ought to pay for the log"—"if Smith did not, defendant would"—"wanted to get it out of Smith if he could"—"that it was mean in Smith not to pay."

Mr. Justice LOEW, before whom the cause was tried, gave judgment for the plaintiff, and defendant appealed.

Daily & Perry, for the appellants.

Chauncey B. Ripley, for the respondents.—I. One who confers upon another an apparent agency to act, should bear the consequence of his *assumed* and *wrongful* acts, rather than the innocent person with whom he deals. The principal should be held responsible for the acts of his agent, performed within the scope of the *apparent* authority which the principal allows him to assume (32 *Barb.*, 18; 35 *Id.*, 467; 16 *Id.*, 77; 44 *Id.*, 469; 31 *How. Pr.*, 97).

II. Where one of two innocent persons must suffer by the acts of a third, he who has *enabled* such third person to occasion the loss must sustain it (*Ct. of Appeals*, 3 *Keyes*, 572; 28 *How. Pr.*, 66; 39 *N. Y.*, 441). If there is evidence of *apparent* authority, the question is not what power was *intended* to be given to the agent, but what power a third person *had a right to infer*, in dealing with him (*Johnson v. Jones*, 4 *Barb.*, 369; 32 *Id.*, 9).

III. It must be presumed that the apparent authority is the real authority; and an agent may bind his principal within the limits of the authority with which he has been apparently clothed (32 *Barb.*, 9; 4 *Id.*, 369). Where an agent fails to perform a duty which his principal owes to a third party, the remedy is against the principal; he cannot sue the agent (5 *Den.*, 639; 2 *Id.*, 115; *Phinney v. Phinney*, 17 *How. Pr.*, 197).

Ripley v. Cochran.

BY THE COURT.—JOSEPH F. DALY, J.—The finding of the justice settles the fact, that Cochran went to the plaintiffs, selected a log and told them he would send a man after it. That afterwards Smith came to plaintiffs and asked for the log Cochran had ordered; that the plaintiffs delivered the log to Smith for Cochran, giving the latter credit for it on the strength of a letter of Thorburn & Waterbury, presented by him when he first came for the log; that Smith was not, in fact, the agent of Cochran, but was told by Cochran, that he could get at plaintiffs' a log of the proper size for the work he (Smith) was about to undertake, being the same work Cochran had in view when he went for the log.

The sole question is, whether Cochran, by any act, held out Smith to plaintiffs as his agent, so as to charge himself.

In my opinion he did. He knew he had left the plaintiffs' promising to send a man for the log, and he must have known that his recommending Smith to go there after the same property could not fail to mislead the plaintiffs. It was his duty to have notified them that he did not want the log, but that Smith did, if he desired to avoid responsibility.

The judgment should be affirmed.

CHARLES P. DALY, Ch. J., and ROBINSON, J., concurred.

Judgment affirmed.

Faris *v.* Peck.

FARIS *against* PECK.

New York Superior Court; General Term, November, 1870.

FRAUDULENT TRANSFER OF STOCK.—MOTION TO VACATE ARREST.

In actions where the cause of action and the facts which authorize an arrest are the same, the court will not, ordinarily, try the merits upon a motion to vacate the arrest.

If the original affidavits made out against the defendant a *prima facie* case of a cause of action authorizing an arrest, the court will not set aside the order unless the proof adduced by the defendant is so clearly preponderating as to leave no reasonable doubt of his success on the trial.

If the special term, on a motion to discharge the order, has determined that there was or was not a clear weight of evidence in the defendant's favor, the general term, on appeal, ought not to disturb such determination.

One who obtains possession of stock belonging to another person of the same name, and transfers it fraudulently to a third person, is liable to an action for fraud and deceit by one who in good faith takes from the latter a transfer for value; and he may be arrested therein.

Appeal from an order.

This action was brought by Henry L. Faris and another, appellants, against William H. Peck and Roderick F. Clow, to recover damages for a conspiracy to defraud the plaintiffs.

An order to arrest the defendants was granted, which, upon motion, was discharged at special term.

The plaintiffs appealed.

The facts disclosed by the affidavits upon which the order of arrest was granted, and others read on the motion, were as follows:

Faris *v.* Peck.

On the formation of the American Merchants' Union Express Company, one William H. Peck, whose residence was unknown to the company, but who resided at Laurens, Otsego county, in this State, became entitled to ninety shares of the capital stock of such company.

The scrip or certificate for such stock was made out and kept by the company in readiness for delivery to said Peck upon his calling for it.

Peck did not call, and a clerk of the company who had charge of the matter, after waiting a long time, examined the New York City Directory, and finding therein the name of "William H. Peck, 222 Washington-street," in said city, inclosed to such address the scrip for said ninety shares of stock, on the evening of February 1, 1869, and sent the same by mail.

The defendant Peck received the letter and inclosure and on the *next day* signed the usual power of attorney in blank, and sold and transferred the ninety shares to the defendant Clow.

Clow afterwards negotiated the stock, through McIntyre, a broker, to the plaintiffs, for a loan of two thousand dollars, delivering to them the same power of attorney in blank.

In the mean time the true owner of the stock had called at the express company's office for it, and the mistake was then discovered.

All efforts of the plaintiffs to get their money back failed, and the defendants were arrested on allegations of a conspiracy to defraud.

Moses Ely, for the plaintiffs, appellants.

A. K. Hadley, for the defendant and respondent Peck.

James Henderson, for the defendant and respondent Clow.

Faris *v.* Peck.

BY THE COURT.*—MONELL, J.—The action in this case is one of the class in which the cause of action and the facts which authorize the arrest are the same. In such actions the court will not, ordinarily, try the merits upon a motion to vacate the arrest.

The true rule is, or should be, that if the original affidavits make out a *prima facie* case against the defendant, of a cause of action authorizing an arrest, the court will not set aside the order, except where the proof adduced by the defendant is so clearly preponderating as to leave no reasonable doubt of his success upon the trial.

And another rule I think should be, that when the court at special term shall have determined that there was or was not a clear weight of evidence in favor of the defendant, the court at general term ought not to disturb such determination, applying to such decision the rule which governs the general term upon findings of fact on the trial of an action.

Applying, then, these rules to the case before us, we should not disturb the decision below, so far as it discharges the defendant Clow from the arrest.

The evidence charging upon him any conspiracy to defraud is altogether too slight to hold him, and a verdict against him, upon such evidence, I think the court would be bound to set aside.

A very different case, however, is presented against the defendant Peck.

There cannot be a doubt that *he* committed a great fraud. He received the shares of stock through the mail, and on the same day (for it was posted to him on the evening of the first, and transferred by him on the second) signed a power of attorney in blank, and sold the stock to Clow.

It would be in vain for him to assert his innocence

* Present, BARBOUR, Ch. J., MONELL and FREEDMAN, JJ.

Faris *v.* Peck.

in the transaction. No one would believe him ; and his feeble attempt at justification, by swearing that he sold the stock to Clow "without any knowledge or intimation from any source whatever that the said certificate was not *bona fide* his legitimate and lawful property," adds to, rather than diminishes, the strength of the charge.

He knew the stock was not his property, and instead of, like an honest man, endeavoring to ascertain and correct the mistake, he dishonestly forged the name of the true owner, and, with intent to deceive and defraud some one, sold and transferred the stock.

Such a signing of the name of the true owner was a forgery (*2 Pars. on Prom. Notes*, 584 ; *Graves v. American Exchange Bank*, 17 N. Y., 205 ; *People v. Krummer*, 4 *Park. Cr.*, 217) ; by means of which forgery, the defendant Peck has made himself liable ; and the question is whether *these plaintiffs* can maintain the action.

There can be no doubt that Clow, who transferred the stock to the plaintiffs, is liable to them, upon his implied warranty of the genuineness of the transerrer's signature to the power of attorney. This is upon the principle of implied guarantees in negotiating bills and notes. Nor can there be a doubt that Clow could recover from Peck for the fraud.

Why not, then, the plaintiffs ? Peck intended to injure some one, and he did injure the plaintiffs ; and having done a wrong, he should be held responsible for such a wrong to any one who by means of it has been injured.

The principle which holds Peck is analogous to that which governs notes and bills, where a person paying value for a forged bill may recover from any party warranting the bill either expressly or by implication of law (*2 Pars. on Prom. Notes*, 601 ; *Coggill v. American Exchange Bank*, 1 N. Y. [1 *Comst.*], 113) ; or, where

Faris *v.* Peck.

the maker of a note puts it in circulation with a forged indorsement of a payee's name, a *bona fide* holder may recover against the maker as upon a note payable to bearer (Foot *v.* Meacker, 3 *Hill* [S. C.], 227; and *Riley's Law Cas.*, 248).

There is another analogy in principle between Peck's liability and the class of cases where consequential damages are recoverable for injuries arising, not immediately from the act, but in consequence of it, as where an obstruction is willfully or wrongfully placed upon the highway, and a wayfarer falls upon it. There the injury being the consequence of the unlawful act, although not immediately arising from it, an action will lie against the wrong-doer.

So, in this case, the injury to the plaintiffs was in consequence of the unlawful act of Peck; and he who did the wrong must be held responsible for all injuries arising from it, whoever may be the injured person.

The complaint in the action is not before us, and we do not know what cause of action is stated; but I cannot see any difficulty, upon the facts, in sustaining an action against Peck for *fraud and deceit*, under the last paragraph in the fourth subdivision of section 179 of the Code, and in such an action he can be held to bail.

I am in favor, therefore, of affirming the order as to the defendant Clow, and reversing it as to the defendant Peck.

No costs.

Priest *v.* Hudson River R. R. Co.

PRIEST *against* THE HUDSON RIVER RAIL-ROAD COMPANY.

New York Superior Court; General Term, October, 1870.

ASSAULT AND BATTERY.—STATUTE OF LIMITATIONS.—TRESPASS.

Where a servant, in the course of his employment, commits an assault and battery, an action for damages therefor, though brought only against his employer, is an action for assault and battery, and therefore barred in two years, by section 93 of the Code of Procedure.

Where a brakeman employed by a railroad company assaulted the plaintiff by striking him, throwing him down, trampling on him, &c., as alleged in the complaint,—*Held*, that the action against the company was for assault and battery.

The old action of trespass discussed and explained.

Appeal from a judgment and order.

Joseph S. Priest, the plaintiff, was about entering one of the defendants' cars at Troy, when the brakeman stationed there to see that passengers had procured tickets before entering the car, demanded the plaintiff's ticket. The plaintiff said he had had no time to procure one. Whereupon the brakeman seized the plaintiff, struck him, and thrust him from the car.

The occurrence was in December, 1866. The action was commenced in April, 1869.

The defendants set up the statute of limitations as a bar.

The principal allegation in the complaint was, "that at the time of his entry upon the cars of the defendant, the defendant, through its agent, violently assaulted

Priest *v.* Hudson River R. R. Co.

the plaintiff, and struck him several blows, and seized him by the collar of his coat, and jammed and pressed him forcibly against the sides and railing of the car, and threw him down, and trampled and stamped upon him after it had thrown him down, and other outrages, indignities, injuries, and enormities on the plaintiff then and there committed, so that the plaintiff was severely bruised, wounded, and injured thereby, and was made ill and lame and disabled from attending to his business ever since, and was compelled to employ medical attendance, and to expend a large sum of money, to wit, the sum of fifty-seven dollars, in curing himself of said injuries, and has ever since been and for a long time will be lame and unable to attend to his business to his damage five thousand dollars."

A motion to dismiss the complaint, on the ground that more than two years had elapsed since the cause of action accrued, was made and denied.

The jury gave the plaintiff a verdict, and the defendants appealed from the judgment, and also from an order denying a motion for a new trial.

F. Loomis, for the defendants, appellants.

A. R. Lawrence, for the plaintiff, respondent.

BY THE COURT.*—*MONELL, J.*—It was conceded on the argument, that if this was an action for an *assault and battery*, it was barred by the statute. Section 93 of the Code requires that actions for "libel, slander, assault and battery, or false imprisonment," shall be commenced within two years. But it is claimed that the case of the plaintiff falls within the fifth subdivision of section 91, of "any other injury to the person or rights of another not arising on contract, and not hereinafter enumerated."

* Present, *MONELL, McCUNN, and SPENCER, JJ.*

Priest v. Hudson River R. R. Co.

The allegations in the complaint are those of an assault and battery, committed upon the person of the plaintiff by the defendants' brakeman. Had the action been against the brakeman, it would have been for an assault and battery.

Has it become a different action by being against the employer or principal, under whose authority or direction the injury was done?

Since the abolition of "forms" of actions, which includes the denomination of actions, and reducing all to one form under the denomination of a "civil action" (*Code*, § 69), it has not been easy to interpret such parts of the Code as, very singularly, still preserve to some extent the denomination of actions. Assault and battery, libel, and slander, are in the main but injuries to the person. Yet we find both in apparently inconsistent attitudes, as we do in the two sections already referred to.

To prevent the statute from attaching, it would be necessary to determine that the action is for an injury to the person other than an assault and battery, and that can be done only by making a distinction between an action against the master and an action against the servant.

The old action of trespass was of three kinds: 1. Trespass for injury to the person, accompanied by force (*vi et armis*), such as assault, battery, or false imprisonment; 2. Trespass for injuries to personal property; 3. Trespass for injuries to real property.

Trespass on the case, commonly called "case," lay for injury to the person or the personal rights or property, not accompanied by force or not immediately injurious.

Under the old form of actions, I cannot doubt this would have been trespass, assault and battery, and not trespass on the case.

The liability of the defendants proceeds upon the

Priest *v.* Hudson River R. R. Co.

principle of agency. Their employee, in performing his assigned duties, committed the assault, and even if it was willful, and accompanied by more than necessary force, it was done in the course of his employment as the servant of the defendants (*Meyer v. Second-avenue R. R. Co.*, 8 *Bosw.*, 305).

The distinction between trespass and case, though finely drawn, was strictly preserved until the adoption of our new code of practice; and it was not unusual to nonsuit a plaintiff who had mistaken his "form" of remedy.

Trespass was the oldest form of action.

Trespass on the case was given later, and in England first by the statute of 13 *Edw. I.*, and was more comprehensive than trespass.

The strictness with which these forms of action were separated in England may be illustrated by the case of *Savignac v. Roome* (6 *Term R.*, 125), where the action was "case" against the master for willful injury by the servant. The court arrested the judgment on the ground that the action ought to have been "trespass." Afterwards the plaintiff brought trespass, alleging *negligence* as the cause of the injury (see 2 *Black.*, 442), and was nonsuited, on the ground that the action ought to have been "case." And the decisions are reconcilable. Under the old forms, for a willful act, trespass lay; for a negligent act, case was the remedy.

In this country, however, and particularly in our State, this rigid strictness was greatly relaxed before the Code, and trespass and case were mostly concurrent remedies.

Assuming, then, as the plaintiff must assume, that the liability of the defendants arises from the act having been done by their servant in the course of his employment, and not negligently or unskillfully (for if it was willfully done outside of his employment, the

Leslie *v.* Leslie.

master would not be liable, see *Wright v. Wilcox* (19 *Wend.*, 343), then it follows that it was a joint trespass for which a joint action, or several actions against either, could be sustained.

But the action would be for the same cause, for what a master does by his servant he does by himself.

I am of opinion, therefore, that the action in this case was for assault and battery, and for such cause was maintainable against the defendants, all being principals in the trespass.

There may be some difficulty in reconciling the difference in the limitation of actions for personal injuries other than assault, &c., but the legislature could never have intended to include in actions for personal injuries all the actions enumerated in section 93. But they did intend, I think, to continue, in effect, the distinction which arises from the well understood meaning of words, and hence to confine the action within the two years' limitation, whenever it can be seen, from the statement of the cause of action, that it is for an assault and battery, &c.

I am of opinion, therefore, that the defense ought to have prevailed.

The judgment and order should be reversed, and judgment absolute granted to the defendants, with costs.

Judgment accordingly.

LESLIE *against* LESLIE.

Court of Appeals; January, 1871.

DISCONTINUANCE.—DIVORCE.—TEMPORARY ALIMONY.

The court have power to grant temporary alimony to a wife pending an action *against her* for divorce.

Leslie *v.* Leslie.

After an order has been made, requiring a husband, plaintiff in a divorce suit, to pay temporary alimony to his wife, he cannot, without complying with it, discontinue on payment of costs, by entering an *ex parte* order.

The court of appeals refused to pass upon the terms on which leave to discontinue should be granted in such a case.

Appeal from an order.

In December, 1866, the plaintiff commenced an action against the defendant for divorce, in the New York superior court, which, in February, 1867, he discontinued. On January 16, 1868, he commenced this suit, in the New York common pleas. A motion for alimony and counsel fees was made, and on July 23, 1868, granted. From this the defendant appealed, obtaining a stay of proceedings. The order was, on May 18, 1869, affirmed, at general term. The decision there is reported in 6 *Abb. Pr. N. S.*, 193, where the facts appear. On May 24, 1869, he entered an *ex parte* order of discontinuance, which was the subject of this appeal, and offered to pay fifty dollars costs. This order was vacated at special term, September 9, 1869. From the order vacating it he appealed, obtaining a stay of proceedings, and on May 16, 1870, the order was affirmed at general term. Whereupon he appealed to this court.

The complaint contained charges of adultery, which the defendant, in her answer, denied. The answer contained counter-charges of adultery against the plaintiff, and asked affirmative relief. To these charges in the original answer plaintiff interposed a reply; but they were renewed in an amended answer, to which he did not reply.

Malcolm Campbell and *John McKeon*, for the appellant.—I. Plaintiff's practice in entering the order of discontinuance, *ex parte*, was regular (*Averill v. Pat-*

Leslie *v.* Leslie.

ters, 10 *N. Y.* [1 *Kern.*], 500; *Cooke v. Beach*, 25 *How. Pr.*, 356; *Bedell v. Powell*, 13 *Barb.*, 183).

II. Plaintiff has an absolute right to enter an order of discontinuance upon payment of costs, at any time before he has admitted a counter-claim of the defendant against him. In the present case a reply had been served, denying all the charges of adultery set up in the answer (*Oaksmith v. Sutherland*, *BRADY*, J., 1 *Hilt.*, 265; *Averill v. Patterson*, 10 *N. Y.* [1 *Kern.*], 500; *Cooke v. Beach*, 25 *How. Pr.*, 356).

A counter-charge of adultery in the answer is not a "counter-claim" under the Code, and the defendant cannot have affirmative relief under such an answer (*H. v. H.*, 40 *Barb.*, 9).

III. The remark in *Daniel's Chancery Practice* (p. 731, 4 London ed.), on the authority of which the decision below seems to have been made, that "where there has been any proceeding which has given the defendant any right against the plaintiff, the latter cannot dismiss his bill as of course," has no application whatever to the question involved in this appeal. (1.) This is shown by the illustration which is given in the text immediately after the remark quoted. (2.) It is perfectly consistent with the decisions in this State, and it refers to such a right as is mentioned in the cases of *Cooke v. Beach*, and *Oaksmith v. Sutherland*,—*e. g.*, where a plaintiff, by admitting a counter-claim, places himself substantially in the position of a defendant, or where the statute of limitations has run against the defendant's counter-claim after the answer has been served.

Previous to a *final decree* in the English and Irish courts of chancery, the complainant had absolute control of his case, and could dismiss it on *payment of costs* (Citing and reviewing at length 1 *Smyth Ch.*, 421; *Carrington v. Holly*, 2 *Madd. Ch.*, 388, 3 Am. ed.; *Locke v. Nash*, referred to in notes to 2 *Madd.*,

Leslie *v.* Leslie.

supra; 1 *Daniel*, 731, 732; 33 *Law J. Ch.*, 703; 4 *N. R.*, 528, *L. J. J.*; *Curtis v. Lloyd*, 4 *M. & C.*, 194; 2 *Jurist*, 1058; *Booth v. Leycester*, 1 *Keene*, 247; *Carriington v. Holly*, *Dickens*, 280; *Locke v. Nash*, 2 *Madd. Treat. on Eq.*, 389; *Davis v. Duke of Marlborough*, 2 *Swanst.*, 167; *Small v. Atwood, Younge*, 407; *White v. Lord Westmeath, Beatty*, 174; *Cooper v. Davis, Reg. Lib.*, 1798; *Cooper v. Lewis*, 10 *Beav.*, 32; *Cooper v. Lewis*, 2 *Phillips Ch.*, 178; *Ainslie v. Simms*, 17 *Beav.*, 57, 174; *Markwick v. Pawson*, 4 *N. R.*, 528.

IV. But if any great weight is to be given to the remark in *Daniel*, then we claim that it is in conflict with the practice and decisions of this State. (a.) In *Cooke v. Beach*, the defendant had taken testimony *de bene esse*, and was deprived of the right to use it by the plaintiff discontinuing his action. (b.) In accordance with the decision in *Oaksmithe v. Sutherland*, if the plaintiff were a non-resident, and discontinued after a counter-claim had been set up in the answer, the defendant would lose the benefit of this jurisdiction, except under special circumstances. (c.) The rules of the former supreme court, the rules of the former court of chancery, the rule of the supreme court in this district, all concur in giving the plaintiff the absolute right to enter an order of discontinuance on payment of costs. Upon the entry of that order the action terminates, unless in some cases where special provision is made by law for the further proceedings, such as a reference to ascertain damages in case of an injunction (1 *Barb. Ch. Pr.*, 225; *Chancery Rule No. 46*; 1 *Burr. Pr.*, 383).

V. But there are decisions of high authority in our own land which affect much more directly the question in this case than the dictum of the second *Daniel*, and which decisions, by analogy, sustain the position of the plaintiff (see 2 *Bish. on Marr. & D.*, § 439; *Persons v.*

Leslie *v.* Leslie.

Persons, 7 *Humphrey*, 183; *Wright v. Wright*, 6 *Texas*, 29). In substance, these two determine that the allowance of alimony, *pendente lite*, is founded upon the common law duty of a husband to provide for the actual wants of his wife; that it is only a substitute, under a state of separation and *pendente lite*, for the enforcement of his liability for necessaries furnished to her; that such alimony does not vest in her as her separate estate; that, upon the suit being dismissed, the husband cannot be obliged to pay any such alimony which may be in arrear, on the ground that if the bill be dismissed it is her duty to return to him, and that if he refuses to receive her he will be liable for her support. Now, if these views be correct, the wife acquires no such vested estate, right, or interest in such an allowance as to make this case an exception to the established rule allowing a plaintiff to discontinue on payment of costs. Temporary alimony is not one of the objects for which a divorce suit is either brought or defended; it is at best merely accessory and incidental, and is not authorized by statute in a case like the present. The statutes of our State, in regard to married women, expressly exclude the idea that the right to such an allowance, or the right to a support, is to be regarded as the separate estate of the wife. It arises from a duty on the part of the husband, for the enforcement of which there exists ample means in the law other than by compelling him against his will to prosecute a suit for a divorce. The wife acquired no right in this suit which she did not possess just as fully before it was commenced, and which she does not possess just as fully on its termination. She not only has the same claim for a support, and the same means of enforcing it, as before, but she has the additional security of an undertaking, with two responsible sureties, for the payment of the amount awarded to her. How, then,

Leslie *v.* Leslie.

can the court, consistently with public policy, which is undoubtedly unfavorable to divorce suits, compel the plaintiff to prosecute the action against his will, or keep the suit alive for the sole purpose of enforcing payment of what is erroneously claimed to be in the nature of a debt due by the husband to the wife, but the true nature of which has been already explained ? The contrary view would permit a wife to assign her claim to the allowance, and enable her assignee to keep the suit alive for the purpose of enjoying the annuity, even after the suit had been voluntarily discontinued by the husband, and after his wife had returned to live with him.

VI. Alimony is not included in the term "costs" (*Code*, § 303).

Mr. Justice Grover.—Has the counsel considered why the plaintiff, on discontinuing his suit, is bound to pay costs ? Is it not because the defendant has acquired a right to costs ? If he has acquired any other right during the litigation, is he not to be secured the benefit of that right also, as a condition of discontinuance ?

Counsel for appellant.—We make the additional point that the court had no power to make an order for *temporary alimony*,—*i. e.*, for the support and maintenance, *pendente lite*, of the wife of the plaintiff in a suit for divorce ; and, consequently, it was error on the part of the court to make the payment of such *temporary alimony* a condition precedent of the order of discontinuance.

1. Conceding, as we do, that the court of common pleas possesses all the power and jurisdiction in such cases of the late court of chancery, neither court has ever had jurisdiction of a suit for divorce, or of proceedings incidental thereto, except in the cases and to the extent specially authorized by statute (2 *Rev. Stat.*, 173, § 36 ; *Peugnet v. Phelps*, 48 *Barb.*, 566 ; *Atwater*

Leslie *v.* Leslie.

v. Atwater, 53 *Id.*, 621; Palmer *v.* Palmer, 1 *Paige*, 276).

2. The English court of chancery had no jurisdiction of divorces of any kind. It was in the ecclesiastical or spiritual courts (1 *Black. Comm.*, ch. 15, 440; 3 *Id.*, ch. 7, 94; *Hopkins*, 557, 478; 1 *Paige*, 276).

3. The only power given to the court by the Revised Statutes in regard to alimony in a suit for an absolute divorce, is: (a.) If a decree dissolving the marriage be pronounced, the court may make a *further decree or order* for support, &c. (2 *Rev. Stat.*, 146, § 45). (b.) In any suit for divorce or separation it may make an order, *pendente lite*, requiring the husband "to pay any sums necessary to enable the wife to carry on the suit" (2 *Rev. Stat.*, 148, § 58). The difference between these two sections in respect to the object of the respective allowances is strongly marked. It is believed that the question now raised has never been distinctly presented to this court for adjudication. The power to make the allowance has either been assumed to exist, or the point has been passed *sub silentio*. In *Mix v. Mix* (1 *Johns. Ch.*, 108), and in *Denton v. Denton* (*Id.*, 364), the chancellor relied on the authorities cited, showing that such a power was exercised by the ecclesiastical courts in England, overlooking the fact that the court of chancery never possessed the jurisdiction of those courts in divorce cases, but derived its whole power and jurisdiction solely from the statutes, which conferred upon the court specific affirmative powers, thus excluding every other or further power or jurisdiction over the subject. These two cases were before the Revised Statutes. *Kirby v. Kirby* (1 *Paige*, 261), was decided upon the authority of the cases last cited, and no reference is made to the statute. The earliest case since the Revised Statutes was *Osgood v. Osgood* (2 *Paige*, 621), in which the court assumed the power to exist, as it was not questioned. The next case in

Leslie *v.* Leslie.

which reference is made to the power of the court is *Jones v. Jones* (2 *Barb. Ch.*, 147), in which the chancellor cites section 58 (misdescribing it as section 57) of 2 Revised Statutes, 148, as giving the court power to allow *both* temporary alimony and the expenses of suit. Ever since, the cases have been silent upon the question of the power of the court to make an order in a divorce suit for the support of a wife, *pedente lite*.

Mr. Justice Peckham.—Do you ask this court to overturn a practice which has been universal in our courts for the greater part of a century?

Chief Justice Church.—In conferring on the court of chancery jurisdiction over divorce cases, were not all usual incidental powers also conferred?

Mr. Justice Grover.—Even if it were conceded that the court of chancery originally erred in granting temporary alimony, the universality of the practice to grant it, for so long a time, would give to such practice the force of law.

Andrew Boardman, for the respondent.—I. The order is not appealable. (1.) It merely sets aside an *ex parte* order. It does not prevent plaintiff from moving below for leave to discontinue. (2.) The only “actual determination” which the court below has made is that, in the condition in which the suit was, defendant had a right to be heard before entry of an order of discontinuance. This does not affect “a substantial right” of the plaintiff. He has no right to put his adversary out of court without a hearing. (3.) The effect of the order appealed from is not “to determine the action,” but to restore it. It does not “prevent a judgment from which an appeal might be taken,” for no appeal could be taken from a judgment of discontinuance. It does not “discontinue the action,” but prevents its discontinuance.

II. If the order is treated as one imposing on the

Leslie *v.* Leslie.

plaintiff other terms than payment of costs as a discontinuance, still it is a *discretionary order*, and not appealable. It is the right and the duty of the court below, to determine whether the defendant might not be injured in respect to the counter-charges by suffering this suit to be discontinued; whether the plaintiff is not now precluded from denying such counter-charges by omitting to reply; whether, by omitting to reply, he has not admitted on the record that the defendant has established one of her defenses, and whether leave to reply will be granted, except on condition of complying with the order of the court as to alimony. The plaintiff has not a right "existing absolutely by force of law," to discontinue an equity suit against the judgment of the chancellor, and without complying with such terms as he may deem reasonable (*De Barante v. Deyerman*, 41 N. Y., 356; *Foote v. Lathrop*, *Id.*, 358; *Tabor v. Gardner*, *Id.*, 232).

III. If the whole question were open to review, and involved the question of alimony merely, the order of the court below should be sustained. The right of the defendant to alimony has been determined by the court below by its orders both at special and general term, and from those orders there has been no appeal. The defendant's right has become fixed. The right to alimony is of so high a character that it has been held that, independently of the statutes, a bill will be sustained which prays for alimony alone, without joining with it a prayer for divorce (*Butler v. Butler*, 4 *Litt.*, 202; *Gallard v. Gallard*, 9 *Am. Law Reg. N. S.*, 463). The right to alimony is so fixed and unassailable under the order of the court, that it must be paid up to the entry of final judgment, even if the decision at the trial is adverse to the wife (*Stamford v. Stamford*, 1 *Edw.*, 317; *Moncrief v. Moncrief*, 15 *Abb. Pr.*, 188). It would be a great defect in the administration of justice if, after the long and severe struggle in this case,

Leslie *v.* Leslie.

the right vested by the order of the court in the defendant, and the duty imposed on the plaintiff, could be nullified by him in the way here attempted. The existence of what have been termed "common orders," or "orders of course," does not in any way weaken this proposition. For what was such an order? Simply one which was always allowed under a certain condition of things; and when that condition of things existed, the attorney had *the sanction of the court* to enter the given order in its name and by its authority. But it was not the less the act of the court. It was not the order of the party. Hence arose the custom of the plaintiff to enter an *ex parte* order of discontinuance on payment of the defendant's costs in cases where no right to anything but costs had accrued to the defendant. As the court would always grant such an order, it allowed the plaintiff to enter it *ex parte*. But still it was by leave and order *of the court* that he was allowed to discontinue, and in no other way. There could be no discontinuance until it was entered on the roll, for a record could not be discontinued but by matter of record, and such entry of record could only be made by leave of the court (1 *Lee's Dic.*, 490-491; and citing and commenting on *Averill v. Patterson*, 10 *N. Y.* [1 *Kern.*], 500; *Daniel's Ch. Pr.*, 731, 4 London ed.). Though the language of judges is sometimes a little loose in speaking of the subject, it will be found, by an examination of the cases, that in no case has a plaintiff been allowed to discontinue his suit on the payment of costs merely, when the defendant's rights, acquired in such suit, might be impaired by such discontinuance (citing and commenting on *Wilson v. Wheeler*, 6 *How. Pr.*, 49; *Bedell v. Powell*, at the Albany general term, 13 *Barb.*, 183; *Cockle v. Underwood*, 1 *Abb. Pr.*, 1; *Van Alen v. Schermerhorn*, 14 *How. Pr.*, 287; *Seaboard & Roanoke Railroad Co. v. Ward*, 1 *Abb. Pr.*, 46; *Cooke v. Beach*, 25 *How. Pr.*, 356). Such being the principle,

Ford *v.* Ford.

its application to this case is obvious. The right to alimony and counsel fees is a vested right, and the duty of the plaintiff to obey the order of the court is clear. Should the plaintiff go to trial, and succeed, he would have to pay alimony up to the entry of judgment. But if the plaintiff be allowed to discontinue, the defendant can no longer call on the court to aid her in obtaining the rights thus vested in her. Those rights would not only be impaired but destroyed.

BY THE COURT.—CHURCH, Ch. J.—We are all of opinion that the order appealed from must be affirmed. Under the circumstances of the case, the plaintiff had no right to determine for himself upon what terms he could discontinue and enter an *ex parte* order of discontinuance on the payment of costs. The terms on which leave to withdraw his suit should be granted, are matters to be determined by the court below. We express no opinion on that subject. We merely decide that the order appealed from must be affirmed with costs.

Order affirmed, with costs.

*Ellen F.
W. N. C. 1871.*

FORD *against* FORD.

New York Superior Court; Special Term, March, 1871.

REFUSAL TO PAY AD INTERIM ALIMONY.—COMMITTAL TO PRISON.

It seems, that in an action by a husband against a wife for divorce, the court have power to order the plaintiff to pay temporary alimony pending the suit.*

* This has now been settled by the court of appeals in *Leslie v. Leslie*, *Ante*, 64.

Ford *v.* Ford.

In the ordinary case of the disobedience of an order to pay *ad interim* alimony, the court has no power to punish, otherwise than by a committal to prison, under 2 *Rev. Stat.*, 535, § 4.

The distinction between contempt of an order "to pay a sum of money," and contempt of other orders,—explained.

It seems, that a precept to commit for contempt of an order "to pay a sum of money" need not, *in terms*, admit the prisoner to the jail limits, but is sufficient if it recites the order for the payment of money, and contains a command to the sheriff to commit the person to prison. It is then a question between the prisoner and the sheriff, whether the former shall be allowed to go upon the limits of the prison.

Ward *v.* Ward, 6 *Abb. Pr. N. S.*, 79, disapproved.

Motion for an attachment.

This was a motion upon an order to show cause why an attachment should not issue against the plaintiff, Frederick W. Ford, for contempt, in disobeying an order for the payment of temporary alimony.

In November, 1870, an order was made, requiring the plaintiff to pay a sum specified in the order, to the defendant, Mary Ellen Ford, for her support during the pendency of an action for a divorce.

The order was served on the defendant, and payment of the sum mentioned in the order demanded.

On his neglecting to pay, the order to show cause was made.

S. Hirsch, for the motion.

D. McAdam, opposed.

MONELL, J.—The Revised Statutes (2 *Rev. Stat.*, 534, § 1), provide that every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct by which the rights or remedies of a party in a cause depending in such court may be defeated, impaired, impeded or

Ford *v.* Ford.

prejudiced, in the following, among other cases (subd. 3). Parties to suits, for the non-payment of any sum of money, ordered by such court to be paid, in cases where, by law, execution cannot be awarded for the collection thereof; or for any other disobedience of any lawful order, decree, or process of such court.

There is a further provision, granting the same power in all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record, to enforce civil remedies of any party to a suit, in such court, or to protect the rights of such party (subd. 8).

In the several cases specified in the statute, *except* that of an order for the payment of money, proof of the misconduct must be furnished to the court (§ 3), and a reasonable time given to the accused party to make his defense. The mode of proceeding is then prescribed—either an order to show cause, or an attachment (§ 5), the adjudication (§§ 19, 20), and the punishment (§ 20).

The fourth section provides that when an order of a court shall have been made for the payment of costs, *or any other sum of money*, and proof shall be made of the personal demand of such sum of money, and of a refusal to pay it, the court may issue a precept to commit the person so disobeying, to prison, until such sum, and the costs and expenses of the proceeding, be paid.

These provisions of the Revised Statutes have not been repealed, nor, as far as I can discover, impaired or affected by any subsequent statute, except in relation to the payment of interlocutory costs (*Laws of 1847*, p. 491, § 2); the act to abolish imprisonment for debt (*Laws of 1831*, ch. 300 § 2), and the Code (§ 471), expressly excepting proceedings as for a contempt, from their operations. The act of 1847 merely exempts *parties* from imprisonment, for non-payment of *interlo-*

Ford *v.* Ford.

curtory costs, leaving the provision concerning the payment of money *other than costs* untouched.

The order in this case is for the payment of a sum of money as alimony, in an action for a divorce. This being an interlocutory or *ad interim* order, it cannot be enforced by execution, that process being allowed only upon *final* judgment, except for interlocutory costs (Code, § 283; Hosack *v.* Rogers, 11 *Paige*, 603; Fassett *v.* Tallmadge, 14 *Abb. Pr.*, 188); and unless, therefore, a party can be proceeded against under the statute concerning contempts to enforce civil remedies, there does not seem to be any remedy for the collection of the alimony, unless it can be found in the power of the court to sequester the property of the husband (2 *Rev. Stat.*, 148, § 60). But even if that statute gives the power to sequester property in cases of *ad interim* alimony, which is doubtful, it furnishes, at most, a mere cumulative remedy, and does not take away the power of the court, if such power exists, under the statute concerning contempts.

In so far as the court has the power in a proper case, to require the payment of a sum of money, *to enable a party to carry on or resist a suit* for a divorce, it is sustained by the letter of the statute (2 *Rev. Stat.*, 148, § 58), which, in terms, gives to the court a discretionary power, to require the husband to pay a sum of money for such purpose. But it was objected by the defendant, that the order, in this case, merely *requiring the payment of temporary or ad interim alimony*, was not sustained either by the letter or spirit of the statute.

If I felt at liberty to look at this as an original question, I should find some difficulty in overcoming the doubt I entertain in regard to it, which arises from the omission to provide for it in section 58 of the statute; but I do not feel at liberty to do so, partly because I am qualifiedly bound to assume the power from the

Ford *v.* Ford.

order itself, it not having been appealed from, but chiefly because of the general and uniform recognition of the power in all courts having cognizance of the subject. In *North v. North* (1 *Barb. Ch.*, 241), the question was directly presented, and the chancellor held that the court had the power independently of the statute. The power is also fully recognized in *Denton v. Denton* (1 *Johns. Ch.*, 364), *Kirby v. Kirby* (1 *Paige*, 261), *Graves v. Graves* (2 *Id.*, 62), *Mix v. Mix* (1 *Johns. Ch.*, 108), *Jones v. Jones* (2 *Barb. Ch.*, 146), *Purcell v. Purcell* (3 *Edw.*, 194), and in numberless other cases. It is also understood to be the uniform and established practice of this court, in the exercise of its discretion, to make the allowance in suitable cases (*Betz v. Betz*, 2 *Robt.*, 694; *Simmons v. Simmons*, *Id.*, 712; *Solomon v. Solomon*, 3 *Id.*, 669; *Boubon v. Boubon*, *Id.*, 715; *Strong v. Strong*, 5 *Id.*, 612; *Clark v. Clark*, 7 *Id.*, 284; *Hoffman v. Hoffman*, *Id.*, 474).

The chancellor, in *North v. North* (*supra*), did not refer to section 60 of the statute, but rested the decision upon the inherent power of the court, and independently of the statute. While section 58 gives power to require the payment of money *to carry on the suit*, and omits giving power to award temporary alimony, section 60 is more general, and provides, that when the court shall make *an order* or a decree, requiring a husband to provide for the maintenance of his children, or *for an allowance to his wife*, security, &c., may be required, and the husband's property be sequestered, &c. An order is not, technically, a decree, although a decree may be an order; and when the legislature gave power, by implication, at least, to make an *order*, and also a decree, for an allowance to a wife, it must be presumed that it had in view the common distinction between order and decree; and, therefore, used the words advisedly. And as an "order" is understood to be an intermediate or interlocutory proceeding, it embraces intermediate ali-

Ford *v.* Ford.

mony, and confers the requisite power to award its payment.

But, without pursuing the inquiry further, and assuming the order to be correct, in what manner and to what extent can it be enforced? As an order to *pay a sum of money*, it falls directly within section 4 of the statute, and the court may issue a precept to commit to prison; but, as it has been held that a person so committed, may avail himself of the liberties of the jail and of the statute respecting assignments by imprisoned debtors (*Patrick v. Warner*, 4 *Paige*, 397; *People v. Bennett*, *Id.*, 282), the remedy is deemed inadequate as a punishment for the offense, especially if *Ward v. Ward* (6 *Abb. Pr. N. S.*, 79), holding that the precept must be in *form* to entitle the prisoner to the jail limits, was correctly decided. In that case it is conceded that a precept may issue, under section 4 of the statute, but that it must *in terms* admit the prisoner to the limits. But I apprehend that the latter part of the decision cannot be sustained, although I am aware that Mr. Justice SUTHERLAND discharged upon *habeas corpus*, as is supposed, for the reason that the precept was not in the proper form, a defendant who had been committed for the non-payment of alimony (*Bishop v. Bishop*, not reported).

The statute admitting to the limits of the jail, in effect, merely enlarges the walls of the jail, and gives a *personal* right to prisoners, in the cases specified; and in a proper case the sheriff is bound to admit to the limits (*Kip v. Brigham*, 7 *Johns.*, 168). The right, therefore, to go upon the jail limits is derived from the statute (2 *Rev. Stat.*, 433, § 40), and not from any mandate put into the precept.

It will be sufficient, therefore, if the precept recites the order for the payment of money, and contains a command to the sheriff to commit the person to prison. It will then become a question between the prisoner

Ford *v.* Ford.

and the sheriff, whether the former should be allowed to go upon the limits of the jail.

But it is further claimed that the remedy is not confined to section 4, but also falls within section 5 of the statute. The latter section provides, that in "all cases other than that" specified in section 4, the court may punish the misconduct or disobedience by a fine or by imprisonment, or by both. Under that section, prisoners committed to the jail, shall be actually confined and detained within the jail (2 *Rev. Stat.*, 437, § 61), and shall not be admitted to its liberties.

I think, however, that it must be conceded, that if the court can issue a precept under the fourth section, and the order is such as is therein specified, it furnishes a complete answer to the question.

The power to impose a fine or imprisonment under section 5, is limited to *other* cases, and cannot be invoked, if the case falls within the fourth section. The same language is used in the third subdivision of the first section, which gives first, power to "punish" parties for non-payment of money, and second, for any "*other*" disobedience of any lawful order—thus separately providing for different causes.

The proceeding under section 4, as has been seen, is summary, and requires no adjudication. Under section 5, it must be adjudged that the misconduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of the party; and upon such adjudication the court may impose a fine, &c.

The neglects, violations of duty, and misconduct, which may be punished as contempts, are many, and different from that which relates to the non-payment of money; and they are such as may very properly be regarded as calculated to defeat, impair, impede, or prejudice the rights or remedies of a party. But the non-payment of money, or the disobedience of an order

Ford *v.* Ford.

for the payment of money, is not calculated to have such effect, and it was probably for that reason that it was separated from other causes, and specially provided for in section 4.

The statute has preserved the distinction between criminal contempts, such as directly affect the dignity, or impair the respect due to the authority of the court itself, and contempts which merely affect the rights or interests of parties ; and has, in effect, divided the latter into two classes, making the disobedience of an order to pay money a separate and distinct cause, and providing for it a separate and distinct remedy ; and, by prescribing a different remedy for all *other* cases, has limited the power of the court, in cases of orders for the payment of money, to the proceeding prescribed by section 4 of the act.

This separation of the causes of contempts, and dividing them into two classes :—1. Disobeying an order for the payment of money ; and, 2. Contempts other than for the payment of money,—was recognized in the late court of chancery (*2 Barb. Ch. Pr.*, 269, *et seq.*), where the first class was uniformly punished by proceeding under section 4.

So far, therefore, as the power of the court to punish contempts is derived from the statute, such power can be exercised only in the manner prescribed in the statute, which, in a case of disobedience of an order to pay money, is a precept and committal to prison. For any *other* disobedience to any lawful order, or decree of the court, and all *other* cases, where attachments and proceedings, as for contempts, have been usually adopted and practiced in courts of record, to enforce civil remedies, or to protect the rights of parties, the offending party may be committed to close custody, and is deprived of the liberties of the jail.

As this case is under and within the statute, it is, perhaps, not necessary to assert or refer to the common

Ford *v.* Ford.

law power of a court of record to punish contempts. The statute, it has been held, has not taken away such power (People *v.* Nevins, 1 *Hill*, 154; Dias *v.* Merle, 2 *Paige*, 494); and the eighth subdivision of section 1 of the statute concerning contempts, was probably designed and enacted for the purpose of continuing the common law power, at least in cases not specifically named in the statute (Brockway *v.* Copp, 2 *Paige*, 578). Yet the revisors in their notes say (5 *Rev. Stat.*, Edm. ed., 502): "In this section, an enumeration of the general cases has been made, *as well to define as to limit a power*, which, while it is absolutely necessary in many cases, is yet, perhaps, more liable to abuse than any other possessed by the courts." And they further say, that they have included "all cases which a diligent examination of all the writers on the subject has discovered, and which, it is supposed, ought to be included." But in a note to the article concerning criminal contempts (*Id.*, 426), the continuance of the common law power, in respect to such contempts, is clearly implied. They say, they have pursued their general plan, "to define and limit *undefined* powers *whenever it was possible*, as well for the information as the protection of the citizen."

The case of People *v.* Nevins (*supra*), so far as it is an interpretation of the statute concerning civil contempts, is, I think, in hostility to the intention of the legislature, as defined by the revisors; at least, it is quite doubtful if the legislature did not intend to limit the common law power to cases not enumerated in the statute.

The report of that case does not disclose the precise nature of the contempt. It was a proceeding against an attorney for not paying money directed to be paid by an order of the court. But whether it was money collected by the attorney for his client does not appear. It was there held, however, that the attorney could be

Ford *v.* Ford.

committed under the common law powers of the court, and independently of the statute. COWEN, J., referring to section 4 of the act concerning civil contempts, says, that it was enacted to avoid the circuity of an order to show cause or an attachment, and therefore gives an execution forthwith, which it calls a *precept*; "but that the statute nowhere forbids the court to proceed in the former common law mode; but merely provides that it *may commit* in a particular form short of that."

The question in that case arose upon a *certiorari* to review proceedings upon a *habeas corpus*, whereby Nevins was discharged from custody; and all that was really decided was, that the officer had no jurisdiction, and could not inquire as to the sufficiency of the commitment. From the facts, as far as they are disclosed, it might have been a criminal contempt. A neglect or refusal of an attorney to pay money to his client, might very properly be adjudged a "willful disobedience of an order lawfully made," within section 10 of the statute concerning criminal contempts. If that was the nature of the contempt, then the interpretation of the statute, in that case, was consistent with the intention of the legislature.

This distinction between contempts is clearly expressed in the revisors' notes above referred to. They say: "A solid and obvious distinction exists between contempts strictly such, and those offenses which go by that name, but which are punished as contempts only for the purpose of enforcing some civil remedy."

From the examination I have made of the statute, and of such cases as I have been able to find, bearing upon the question, I am satisfied that in the ordinary case of the disobedience of an order to pay *ad interim* alimony, the court has no power to punish, otherwise than by a committal to prison, under section 4 of the statute.

Duff *v.* Wardell.

That a state of facts might be presented which would authorize a proceeding under the other sections of the statute, is possible ; but it is enough to say, that no such facts appear in this case.

The motion for an attachment must be denied. But the plaintiff, upon furnishing proof of the non-payment, &c., of the alimony, will be entitled *ex parte* to a precept to commit, &c.

Ordered accordingly.

DUFF *against* WARDELL.

Supreme Court, Second Department, Second District ; General Term, December, 1870.

Costs.—EXCEPTIONS HEARD IN FIRST INSTANCE AT GENERAL TERM.

Where a verdict is had at the circuit, and the court directs the exceptions to be heard in the first instance at general term, if the general term direct judgment for the plaintiff, he is entitled to costs of the general term, as well as costs for previous proceedings in the cause, even though the verdict be reduced.

It makes no difference that the defendant is sued as executor.

Motion to direct the clerk to tax costs.

This action was brought to recover damages for a trespass alleged to have been committed by defendant, in carrying away plaintiff's goods. It was tried before Mr. Justice GILBERT, in October, 1868, and a verdict rendered for plaintiff for two hundred and seventy-five dollars. Exceptions having been taken, the court directed the entry of judgment to be suspended, and the exceptions to be heard in the first instance at the gen-

Duff *v.* Wardell.

eral term. At the hearing there in December, 1869, the court were of the opinion that the verdict should be reduced by the sum of one hundred dollars, and accordingly directed judgment for one hundred and seventy-five dollars, with costs.

The plaintiff noticed the costs for adjustment, and the clerk refused to tax costs of hearing before the general term because the court had there reduced the verdict.

Mr. Sandford, for the plaintiff, now moved for an order directing the clerk to tax such costs.

Lewis Johnston, opposed, objected that the motion should properly have been made at special term.

BY THE COURT.—The application is properly made here, for it is in reference to the taxation of costs awarded by the general term.

Mr. Sandford insisted that the plaintiff was entitled to costs of the general term, because he was compelled to go there in order to gain his judgment; and the verdict, although reduced, still was for a sufficient amount to carry costs.

Mr. Johnston, for the defendant, argued that, as the defendant had had the burden of making a case, and the costs were in the discretion of the court, under section 303 of the Code, and there had been a diversity of opinion at the general term, the presiding justice having dissented, and the defendant being an executor, costs should not be awarded against him.

BY THE COURT.—J. F. BARNARD, P. J. (orally).—In this case the plaintiff is entitled to the costs he asks for as a matter of right. It should be so, for the argu-

Hodnett *v.* Smith.

ment at the general term was but a portion of the trial. The court did not finish the cause at the circuit, but, important questions of law arising, they were reserved to be considered by the court at general term, and the general term, after hearing the exceptions, first ordered judgment for the plaintiff, and with costs.

Where the cause is not disposed of at the circuit, and it is necessary to go before the general term in order to obtain judgment on the verdict, the prevailing party is entitled to the costs of that hearing.

It can make no difference that the defendant is sued as executor, for that ought not to exempt him from the operation of this rule.

Ordered accordingly.

HODNETT *against* SMITH.

New York Superior Court; General Term, March, 1870.

EVIDENCE.—SUBSCRIBING WITNESS.—PROOF OF ABSENCE.

The execution of an instrument under seal must be proved by the subscribing witness, if there be one, notwithstanding the present rule allowing parties to be witnesses; and proof of due diligence, such as would be used by a prudent man, in a sincere search for the witness, is still necessary, to let in secondary proof.

Mere testimony of a third person, that, on information from a friend of the witness, he believes the witness has gone abroad, is not enough.

Appeal from a judgment entered in favor of the

Hodnett *v.* Smith.

plaintiff upon the verdict of a jury, and from an order made at special term denying defendant's motion for a new trial upon a case.

The action was brought by Ann Hodnett against MacPherson Smith, and others. The complaint alleged a conversion by defendants of plaintiff's property, consisting of the contents of a liquor store.

The defendants, by their answer, justified, under executions issued against John Hodnett, plaintiff's husband, and claimed that the property levied upon and taken was, at the time of such levy, the property of said John Hodnett, or that said John Hodnett had an interest therein liable to levy and sale under execution.

Upon the trial it appeared that John Hodnett had hired the whole house, including the liquor store, and conducted the liquor business at said store up to within about five weeks prior to the levy; that he had executed a chattel mortgage upon the contents of the liquor store to William Harney, which was foreclosed; that upon the sale under said mortgage the property was knocked down to William Dooling, who agreed with Mr. Ryan, plaintiff's brother, to convey it to the plaintiff; that Ryan advanced the necessary funds for that purpose, and that William Dooling, within a few days after his purchase, and shortly before the levy, did convey the said property to the plaintiff for an alleged consideration, which yielded him a profit of ten dollars for his trouble. The main point involved in the case, as the court charged, was, whether the various transactions were a mere device by which the wife should be put forward as being the ostensible, whereas, in fact, the husband still remained the real owner, or whether it was a *bona fide* transaction, whereby the title to this property became vested in the wife absolutely, as her own property.

To substantiate her claims plaintiff offered in evi-

Hodnett *v.* Smith.

dence a bill of sale of said property, executed by William Dooling to her under seal, which purported to have been sealed and delivered in the presence of one J. C. Wadsworth as subscribing witness. The evidence showed said Wadsworth to be an attorney-at-law, who, at said time, had his office in Duane-street, in the city of New York. William Dooling proved his own signature, and testified that he did not know where J. C. Wadsworth was. Counsel for plaintiff then called as a witness Florence Leary, who, upon this point, testified as follows :

"I know Mr. Wadsworth. I believe he is out in Omaha. He is subscribing witness to the bill of sale."

Q. By the Court.—How do you know he is in Omaha ?

A. I heard he had left and went there.

Q. Whom did you hear it from ?

A. A bookseller he used to deal with told me, and I heard it from a friend of his, Mr. Benedict, in his office, who told me he had gone out there.

Counsel for defendants objected, on the grounds that the paper was not proved—that the subscribing witness should prove it—that his absence was not excused.

The court overruled the objection and admitted the bill of sale, to which ruling defendants' counsel duly excepted.

N. A. Chedsey and A. J. Vanderpoel, for the appellants.

C. A. Henriques, for the respondent.

BY THE COURT.—**FREEDMAN, J.**—The bill of sale was an important piece of evidence, and well calculated to exercise a strong influence over the jury. If no sufficient foundation was laid for its introduction, an error was committed by receiving it in evidence. Being

Hodnett *v.* Smith.

an instrument under seal, there can be no question that plaintiff was bound to prove its execution by the subscribing witness, or to show by competent evidence that he could not be produced, or was incapable of being examined (*Hollenback v. Fleming*, 6 *Hill*, 303, and authorities therein cited), unless the change in the law, which allows parties to be witnesses, has altered the rule, or afforded a reason for dispensing with it. That such is not the case has been distinctly held by the supreme court and the court of common pleas (*Jones v. Underwood*, 28 *Barb.*, 481; *Story v. Lovett*, 1 *E. D. Smith*, 153; see also *King v. Smith*, 21 *Barb.*, 158). I can see no reason why this court should hold otherwise. Proof of due diligence, such as would govern a prudent man in a sincere search for the subscribing witness is, therefore, still necessary to let in secondary proof (*Van Dyne v. Thayre*, 19 *Wend.*, 162).

Where the failure to produce the subscribing witness has been satisfactorily accounted for, the genuineness of the signature of such witness may be proven; and when it appears that this cannot be done, and not before, proof may be given of the handwriting of the party who executed the instrument (*Wilson v. Betts*, 4 *Den.*, 201; *McPherson v. Rathbone*, 11 *Wend.*, 96).

In the present case no objection was made upon the ground of the absence of proof as to the genuineness of the signature of the subscribing witness, and consequently it cannot be raised on appeal for the first time. But the objection that the absence of the witness had not been accounted for was distinctly taken. Upon examination of the case, I am unable to find any evidence tending to show that plaintiff used due diligence, or any diligence whatever, to procure the attendance of the subscribing witness. In fact, there is no evidence that plaintiff made or caused to be made, any effort in this direction. It does not appear that Leary was authorized or requested to look for such witness. He

Premo *v.* Smith.

simply swears that he believes the witness went to Omaha, because a bookseller and a friend of the witness had told him so, but does not show that these persons knew or were in position or likely to know the fact. Nor does he specify the time of the receipt of this information. No circumstance is stated from which either the fact or the time of the departure of the witness could be reasonably deduced. For all that appears the witness might have gone and returned at least one year before the trial. This is clearly insufficient.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to appellants to abide the event.

MONELL, Ch. J., and McCUNN, J., concurred.

Ordered accordingly.

PREMO *against* SMITH.

New York Superior Court; General Term, May, 1870.

STAY OF PROCEEDINGS.—DISCOVERY.

Where plaintiff fraudulently makes way with evidence of defendant's rights, material to the action, his proceedings may be stayed until he shall produce it.

Appeal from an order.

The action was brought by John Premo against Philip Smith.

Premo *v.* Smith.

John E. Parsons, for the appellant.

James W. Culver, for the respondent.

BY THE COURT.*—FREEDMAN, J.—This is an appeal from an order staying plaintiff's proceedings. Upon the hearing of the motion below, the defendant showed by affidavit, and by the records of the court of common pleas for the city and county of New York, that the plaintiff had willfully and fraudulently either destroyed or withheld from the defendant the original specifications of a written building contract, which defined the rights of the parties to the action, and were material for the determination of such rights. The plaintiff read no papers in opposition to the motion, and the court thereupon granted an order staying all proceedings on the part of the plaintiff in the action, until he shall produce and deliver to the attorney for the defendant one of the said original specifications, and giving to the defendant twenty days after such service to answer the complaint or take such other proceedings in the action as he shall be advised.

Upon an examination of the facts it clearly appears that the court below had not only the power to make the order appealed from, but that the order, as made, was a proper one under the circumstances.

The order should be affirmed, with costs.

* Present, BARBOUR, Ch. J., and FREEDMAN and SPENCER, JJ.

Dibble *v.* Camp.

DIBBLE *against* CAMP.

Supreme Court, First Department, First District;
General Term, January, 1871.

ARBITRATION.—REVIEW OF JUDGMENT ON AWARD.

The party aggrieved by the judgment entered on an award of arbitrators under the statute, cannot review it by making a case and appealing, except for the errors specifically provided for by the statute.

Appeal from a judgment.

Calvin B. Dibble, Barzilla G. Worth, and George M. Dewey, entered into an agreement with Calvin B. Camp, by which the former agreed to sell the latter a quantity of cotton. A part of the cotton having been destroyed by fire, while the process of delivery was going on, a controversy arose as to whether the delivery was complete, and entitled the sellers to full payment.

These matters of difference were submitted by them to arbitrators by mutual bonds, under the provisions of the Revised Statutes, stipulating that judgment might be rendered in the supreme court, upon the award which should be made pursuant to the submission. The arbitrators having made their award in favor of the sellers, against Camp, judgment was entered upon it, in the supreme court, in the usual form.

Camp thereupon appealed from the judgment to the court at general term; and made a case, containing the

Dibble *v.* Camp.

submission and other parts of the judgment roll, and also testimony taken by the arbitrators.

The judgment included costs and expenses which had been allowed by the award, and also an allowance in addition to costs, made by order of the court.

M. M. Vail, for the respondent.—I. This appeal is from the judgment entered on the award of the arbitrators, solely on a case made by the appellant, containing simply the testimony taken before the arbitrators, and a copy of the judgment roll, and not an objection or exception of any kind, and no attempt has been made to set aside or modify the award, and it is conceded by the appellant that there are no grounds therefor. There is no authority for such an appeal, either in the Code of Procedure or otherwise. The proceedings in arbitrations under the Revised Statutes are governed entirely thereby, and they provide the only way in which an award by arbitrators or the judgment rendered thereon may be reviewed, and no such appeal as this is authorized by the said statutes (see printed case; 2 *Rev. Stat.*, 4 ed., p. 774, ch. 8, part 3, §§ 10, 11, 12; *Code of Pro.*, § 471; *Smith v. Cutler*, 10 *Wend.*, 590; *Ketcham v. Woodruff*, 24 *Barb.*, 147). And there is no appeal from an award of arbitrators under said statutes, except from an order on a motion for the purpose of setting aside or modifying said award, and there is no appeal from a judgment on an award of arbitrators in any case; but such judgment can only be reviewed by writ of error (*Ketcham v. Woodruff*, 24 *Barb.*, 147; *Isaacs v. Beth Hamedrash Society*, 19 *N. Y.*, 584; *Freeman v. Kendall*, 41 *Id.*, 518; *Daggett v. Keating*, decided at the late May term of the court of appeals, but not yet reported).

II. This court has no power to hear the appeal; its power to review or intermeddle with an award of arbit-

Dibble *v.* Camp.

trators, made under a submission pursuant to the provisions of the Revised Statutes, is limited by the plain words of said statutes, and as they only provide that such an award may, on motion, be vacated or modified, for corruption, partiality or gross misbehavior in the arbitrators, or for some palpable miscalculation, mistake, or irregularity by them, and contain no warrant whatever for this appeal, the court has not the power, and ought not to entertain it. And the court will not review or intermeddle with an award of arbitrators upon the merits in any case, where, as in this case, none of the objections thereto exist, specified in sections 10 and 11 of the Revised Statutes, *supra* (Smith *v.* Cutler, 10 *Wend.*, 590; Emmet *v.* Hoyt, 17 *Id.*, 413; Cranston *v.* Kenny, 9 *Johns.*, 212; Jackson *v.* Ambler, 14 *Id.*, 105; Lowndes *v.* Campbell, 1 *Hall*, 598; Mitchell *v.* Bush, 7 *Cow.*, 185; Perkins *v.* Giles, 53 *Barb.*, 342; Turnbull *v.* Martin, 37 *How. Pr.*, 20).

II. On the merits the judgment should be affirmed (citing many authorities).

Nelson Cross, for the appellant.—I. The arbitrators erred in matters of law, in finding that the forty-nine bales of cotton, part and parcel of the one hundred and nineteen bales embraced in the contract, had passed by delivery from the plaintiffs to the defendant. Property does not pass unless the sale be complete. It is not complete so long as anything remains to be done to the thing sold, to determine either its quantity or quality, or any other thing yet undetermined, upon which the price depends (1 *Pars. on Contr.*, 441; *Pars. Com. L.*, 48; Outwater *v.* Dodge, 7 *Cow.*, 87; Rapelye *v.* Mackie, 6 *Id.*, 250; Ward *v.* Shaw, 7 *Wend.*, 404; Fitch *v.* Beach, 15 *Id.*, 222; Hart *v.* Tyler, 15 *Pick.*, 17; Davis *v.* Hill, 3 *N. H.*, 382; Shindler *v.* Houston, 1 *N. Y.*

Dibble *v.* Camp.

[1 *Const.*], 273; *Gerard v. Prouty*, 34 *Barb.*, 454). The rule is the same where there is a delay in delivering, by request and agreement (*Pars. Com. L.*, 47). If goods be stolen, burnt, or otherwise damaged or destroyed after sale and previous to delivery, the loss is the seller's (*Ib.*; see also decision by INGRAHAM, J., in *Gerard v. Prouty*, 34 *Barb.*, 454).

II. The submission does not authorize the arbitrators to award to the plaintiffs their costs and expenses of the proceedings in the arbitration. Hence, in making such award the arbitrators exceeded their authority (People *ex rel.* Howard *v. Newell*, 13 *Barb.*, 97; Matter of Vanderveer, 4 *Den.*, 249).

III. The allowance of five per cent. upon the amount of the award—viz: eight thousand four hundred and eighty-four dollars, making one hundred and seventy-four dollars and twenty cents—to plaintiff's attorney, and permitting the same to be entered in the judgment upon the award (see judgment roll), is unauthorized, and consequently erroneous. The authority vested in the court by statute to tax costs, does not extend to the granting of an extra allowance to the attorney of the winning party, to be carried into the judgment (see Act of 1854, ch. 270, p. 592).

IV. The award of the arbitrators should have been against the plaintiffs and in favor of the defendant, upon the ground of the non-delivery of the forty-nine bales of cotton in controversy.

BY THE COURT.—INGRAHAM, P. J.—We are all of the opinion that this judgment must be affirmed. If the plaintiff feels aggrieved at the award, his only remedy is to move the court at special term, either for an order modifying the award, or for an order vacating it; and upon the grounds and in the manner provided by the Revised Statutes. It is conceded by the

Dibble *v.* Camp.

counsel for the appellant, that he has no statutory grounds for such a motion. He is therefore concluded by the judgment, which can only be reviewed by a writ of error; and he has no right to make a case and appeal thereon, for the purpose of reviewing the award made by the arbitrators on the merits.

The court will not in any case review an award made by arbitrators under the statute, except on the grounds specifically provided by the Revised Statutes, viz: fraud or undue means in procuring it, evident partiality or corruption in the arbitrators, misconduct or excess of power on their part, imperfect award, miscalculation, mistake, or unauthorized award (2 *Rev. Stat.*, 542, §§ 10, 11).

GEO. G. BARNARD and CARDODO, JJ., concurred.

Judgment affirmed, with costs.

Battell v. Burrill.

BATTLELL *against* BURRILL.*Supreme Court, Second Department, Second District;*
*General Term, January, 1871.*INFANT.*—SALE OF LANDS BY GENERAL GUARDIAN.—
AUTHORITY OF COUNTY COURT TO GRANT
ORDER TO SELL.

The provisions of 2 *Rev. Stat.*, 193,—entitled “Of proceedings in relation to the conveyance of lands by infants, and the sale and disposition of their estates,”—do not authorize a release or quit-claim to be made on behalf of infants,—*e. g.*, for the purpose of abandoning land taken for a local improvement.

Proceedings under an order from a county court, authorizing a consent to such a release, are void.

The jurisdiction of the court to alienate the infant’s title by a sale, is derived wholly from the statute.

* In *GILES against SOLOMON* (*Supreme Court, First District, Special Term, December, 1867*), it appeared that plaintiff’s father died in 1840, leaving a widow and six children. In January, 1841, a foreclosure suit was begun, upon a mortgage executed by the father in his lifetime; and the widow and the children *in esse* were made parties. Two days before the decree, in April, 1841, the plaintiff, a posthumous child of the deceased mortgagor, was born. In 1866 she began her action to redeem. *Held*, that she was entitled to one-seventh of the premises and back rents, on paying one-seventh of the mortgage.

This action was brought by Eliza T. Giles against Barnet S. Solomon and wife, Henry Morrison, and Benjamin J. Hart, executors of Henry J. Hart, deceased; and Paschal W. Turney and Austin W. Ausbin, executors of Samuel D. Bradford, deceased.

R. W. Townsend, for the plaintiff.

Henry Morrison, for the defendants, among other points, urged that,—I. The foreclosure was a proceeding *in rem*; and in such an action the decree retroacts to the time of suit brought, and involves all the parties, their privies and successors in interest (*Mead v. Mitchell*, 17 N. Y., 210, 217; *Greenl. on Evid.*, §§ 525, 540; 1 *Stark. on Evid.*, 446; *Cleveland v. Boerum*, 24 N. Y., 613).

II. A child *en ventre sa mere* at law is *in esse* for many purposes, but in equity, in foreclosure suits, those seized of the first estate of inherit-

Battell *v.* Burrill.

Appeal from a judgment.

This action was brought by Joseph Battell against George W. Burrill. The facts appear in the opinion.

ance are those *in esse*, and are the only necessary parties defendant who are in actual existence at the time of filing the bill (*Nedine v. Greenfield*, 7 *Paige*, 544). And all others are bound by the decree as beings virtually represented by those in whom the present estate is vested (*Mead v. Mitchell*, 17 *N. Y.*, 210; *Willis v. Slade*, 6 *Ves.*, 498; *Story's Equity Pleadings*, § 147; *Gaskell v. Gaskell*, 6 *Sim.*, 643; 2 *Peere Wms.*, 518; *Story's Equity Jur.*, 656 (a); *Cheeseman v. Thorne*, 1 *Edw.*, 629; 2 *Haff. Ch. Pr.*, 161; 2 *Barb. Ch. Pr.*, 287; *Coote on Mortg.*, 122; *Doe v. Provoost*, 4 *Johns.*, 61; *Story's Equity Pleadings*, §§ 140, 144, 182, 198).

III. To sustain this action will unsettle titles, and require parties to ascertain, at their peril, the possibility of other heirs being born.

The decision, as follows, was rendered by JAMES, J.—This cause came on for trial before the court at special term, in and for the city and county of New York; and after hearing the proofs and the arguments of the counsel for the respective parties, I find the following facts, with my conclusions of law thereon:

That by deed, dated May 20, 1836, Robert Giles, Jr., became seized in fee of the premises on Thirty-third-street, New York, described in the complaint.

That on the said May 20, 1836, said Giles, as part security for the purchase money of said premises, made, executed, and delivered to his grantor a mortgage thereon for the sum of seven hundred and five dollars, payable in two years, with interest at six per cent., payable semi-annually, which said deed and mortgage were duly recorded. That the interest on said mortgage was paid up to May 20, 1840. That in 1836, said mortgage was duly assigned by the mortgagee therein to Clarkson Crolius.

That Robert Giles, Jr., died on October 21, 1840, and was at that time seized and possessed of the aforesaid premises in fee, subject to the aforesaid mortgage.

That in January, 1841, an action to foreclose said mortgage by the aforesaid assignee was commenced, and such proceedings were thereupon had in the courts of chancery of the State of New York that an order directing the sale of said premises to satisfy said mortgage was made on April 12, 1841, and the decree of foreclosure entered May 19, 1841.

Battell *v.* Burrill.

TAPPEN, J.*—The plaintiff brings this action to recover possession of land in the city of Brooklyn. His title depends upon the validity of certain proceedings which are claimed to be valid, and to have been

* Present, BARNARD, P. J., and TAPPEN, J.

That said premises were duly sold under and in pursuance of said decree; that said Clarkson Crolius became the purchaser thereof, and received the master's deed therefor May 20, 1841, and entered into possession under it.

That said Robert Giles, Jr., at the time of his death, was a married man, and left him surviving his wife and six children then *in esse*.

That on April 10, 1841, said wife of said Robert Giles, Jr., was delivered of a posthumous child, of which said Robert Giles, Jr., was the father, and that plaintiff is that child.

That plaintiff was not a party to said mortgage foreclosure, nor has she since, by any supplemental or other proceeding, had her equity of redemption in the aforesaid premises closed.

That the dower and equity of redemption of the widow and other six children of said Robert Giles, Jr., in said premises, has been duly foreclosed.

That no surplus remained on said foreclosure and sale.

That at the time of said foreclosure and sale said premises were vacant, and that since there have been valuable buildings thereon.

That on March 1, 1852, said Crolius sold and conveyed said premises to Ogden M. Rogers and George P. Burch; that on May 1, 1853, said Rogers and Burch sold and conveyed the same to James Phalen, and that said Phalen, on April 25, 1859, sold and conveyed the same to Barnet S. Solomon and Henry J. Hart.

That said Henry J. Hart died in 1863, leaving a will, wherein Henry Morrison and Benjamin Hart were named as executors; that said will has been duly proved, letters duly issued to said named executors, and they have entered upon the discharge of their duties as such; that said will vested said executors with full power over the real estate of said testator; that Julia Solomon is the wife of Barnet Solomon.

That said Solomon and Hart, at the time of the purchase of said premises from said Phalen, executed and delivered to him a mortgage for dollars, as a part of the purchase price; that said mortgage, and the bond to which it was collateral, are still unpaid; that the sum due thereon at this date is dollars; and that said bond and mortgage are now held and owned by the executors of

Battell *v.* Burrill.

effectual for the purpose of alienating the title of certain infant owners of the fee. They are the children and heirs of one Anthony Steinworth.

The lot in question is a portion of four lots which belonged to them in 1847. In that year, the city of

Samuel D. Bradford, deceased, Paschal W. Turney and Austin W. Ausbin.

That before the commencement of this action the plaintiff tendered to the defendants two thousand and twenty-two dollars and ninety-one cents, and claiming to redeem the whole of said premises from said foreclosure sale, and demanding possession thereof, which were declined and refused.

Conclusions of Law.—1st. That plaintiff is a lawful heir at law of Robert Giles, Jr., deceased; that as such, she was seized of an estate of inheritance of one-seventh of the real estate whereof said Robert Giles, Jr., died seized, subject to incumbrances existing at his death.

2nd. That plaintiff's rights as such heir were not affected by the said foreclosure; her equity of redemption by said foreclosure sale is unimpaired, and she is entitled to redeem her estate in said premises, one undivided seventh thereof.

3rd. That an account should be taken of the aforesaid mortgage, and the interest thereon, at six per cent., to the time of stating said accounts, of the taxes on said premises, and the interest thereon from the time of payment to same time, and the value of the permanent improvements thereon, with interest from the time of their completion to same date, and one-seventh thereof stated.

4th. That an account should also be taken of the rents and income from said premises, with interest thereon from the end of each year, ending May 1, up to the time of taking the account, and one-seventh thereof stated.

5th. That John O. Mott, Esq., counselor at law, New York, is hereby appointed a referee to take and state said accounts.

6th. That upon the coming in of the report of said referee, if it be found that one-seventh of the mortgage, taxes, and improvements on said premises, and the interest, exceed one-seventh of the rents, incomes and interest thereon of said premises, a decree may be entered declaring that one-seventh of said premises are redeemed, and that plaintiff stands seized in fee of one undivided seventh thereof, subject to a lien for such excess, to collect which execution may issue; but if said plaintiff shall pay such excess, or if the mortgage, taxes, improvements and interest do not exceed the rents, income and interest, then a decree

Battell *v.* Burrill.

Brooklyn instituted proceedings to open De Kalb-avenue, and to close De Kalb-street. Commissioners of estimate were appointed, and the usual proceedings had.

On September 30, 1849, upon petition of the mayor and common council, the county court appointed A. H. Sidell guardian *ad litem*, in that proceeding, of the four Steinworth children, who were all infants under the age of fourteen years.

The opening of De Kalb-avenue took a portion of these lots, and left a strip of land bordering upon the avenue, which, under the act of April 30, 1833, the owners were entitled to relinquish to the city of Brooklyn, and to have compensation therefor awarded by the commissioners. The consent to relinquish was to be in writing. Thereupon, an application was made on the petition of John H. Hess, reciting that he was the general guardian of said infants, and on the petition of A. H. Sidell, as their guardian *ad litem*, asking for "an

shall be entered declaring one-seventh of said premises redeemed, and that plaintiff stand seized thereof in fee as tenant in common, free from all liens and incumbrances, including the mortgage of Solomon and Hart to Phalen, and now held and owned by the executors of Bradford; and that, in the latter case, the plaintiff be let into possession of one undivided seventh, and have a writ of possession therefor.

7th. That if there shall be found anything coming from the plaintiff for principal and interest on said mortgage, taxes, &c., the same shall be first applicable upon the said mortgage made by Solomon and Hart to Phalen, and shall be paid to its present owners and holders, not to exceed the amount due thereon.

8th. That the defendants, the executors of Bradford, recover their taxable costs of the defendants, Solomon and Morrison and Hart, as executors, &c.

9th. That because the demand of the plaintiff at the time of tender exceeded her rights, she is not entitled to her costs of action against any of the defendants, farther than the costs of the referee in taking and stating the account as above ordered, which shall be a charge against the defendants, Solomon, and the executor of his late partner, Hart, for which plaintiff may have execution.

Upon the coming in of the referee's report, as above stated, let a decree be entered in pursuance of the foregoing finding.

Battell *v.* Burrill.

order giving the petitioners, or one of them, power to abandon the said strip of land, known on the map as No. 144, believing that the best interests of the infants will be thereby promoted;" and an order was made by the county court, dated November 24, 1847, "that the prayer of the petitioners be granted, and that they, or either of them, are hereby authorized to give a consent in writing to the said commissioners, on behalf of said infants, for the abandonment of the piece of land, in such form as may be necessary."

An instrument was read in evidence, bearing date October 4, and acknowledged November 23, 1847, executed by parties who are described as Margaret Steinworth, widow of Anthony Steinworth, and John H. Hess, as general guardian of the infant children of said Anthony Steinworth. The execution was certified by A. H. Sidell, as commissioner of deeds.

This paper purports to be a consent in writing to the abandonment of the land to the city, and to release and quit-claim the same. The children are not named in the instrument.

By the report of the commissioners, dated November 14, 1847, the sum of four hundred and twenty dollars was awarded to the heirs of Anthony Steinworth, for the land taken for the opening of De Kalb-avenue, and seventy-five dollars for the land not taken, but stated to have been abandoned by the owner. The awards were payable to John H. Hess, mortgagee. Hess held a mortgage upon the property, and received the money.

It is not proven that Hess was general guardian for the children, except by the recital in the petition, order, and other papers in evidence.

This strip of land, lot No. 144, bordered upon De Kalb-street or Cripplebush-road. This street was closed by resolution of the common council, May, 1851. One James Humphrey owned land on the opposite side of the road, and upon its being closed he claimed, as adjacent owner, to be entitled to a convey-

Battell *v.* Burrill.

ance of the strip of land in question; and the same was conveyed to him by the city of Brooklyn, by deed dated July 23, 1851, for the expressed consideration of seventy-five dollars, being the amount paid by the city therefor, under the award. The plaintiff claims under this title.

The defendant is tenant of the land under the Steinworths, and the action is defended in their behalf.

The proceedings taken did not alienate their title.

The jurisdiction of the court to alienate their title by a sale, is derived wholly from the statute (*Baker v. Lorillard*, 4 *N. Y.* [4 *Comst.*], 275), and neither the infants or their guardians appointed for that purpose can convey lands except pursuant to the order of the court (*Hyatt v. Seeley*, 11 *N. Y.* [1 *Kern.*], 52).

A consent by the infants, or on their behalf, is not authorized by statute. A release or quit-claim by a general guardian acting under the authority of the order of the county court is of no effect, and if such person be not general or special guardian there is even no consent.

The consent to relinquish or abandon the land for a specified sum was not in the nature of a sale to the city, but the statute which authorizes a court to direct the sale, mortgage or lease of infants' lands was in no respect complied with.

It follows that without a lawful consent, the title taken by the city of Brooklyn was invalid, and that the grantees by conveyance from the city have no adequate title to the lands (*Embry v. Conner*, 3 *N. Y.* [3 *Comst.*], 511).

It appears that the Steinworths have been in continued possession of the property notwithstanding the proceedings in their names, and that neither the plaintiff nor any of his grantors has been at any time in possession of the disputed property.

The plaintiff's counsel claims that the city acquired a valid title, because the act under which proceedings were had, declares (section 3), that upon confirmation

Scofield *v.* Whitelegge.

of the report, and payment or tender of the amount at which the residue is estimated, the same shall vest in the city in fee simple.

This would undoubtedly be so if the persons by whose act or consent the city took the lot, had capacity or authority to give the consent; but I am of opinion, founded upon the statute, that such capacity or authority did not exist.

The Revised Statutes (1 *Rev. Stat.*, 729, § 10, p. 126, vol. 2 of the Fourth Edition), provide that every person capable of holding lands except idiots, persons of unsound mind and infants, may alien the estate, &c. Article 7, ch. 1, part 3 (2 *Rev. Stat.*, 194, 2 *Edm.*, p. 359), entitled "of proceedings in relation to the conveyance of lands by infants, and the sale and disposition of their estates," provides the manner in which such sale or disposition may be made; and the authorities heretofore quoted determine that these proceedings must be followed to alienate an infant's estate.

And as these proceedings were not taken in any respect, the case at bar does not present a question of irregularity in the proceedings, but of the total want of valid proceedings.

The judgment should be reversed, and new trial ordered, costs to abide event.

Order accordingly.

SCOFIELD *against* WHITELEGGE.

New York Superior Court; General Term, January, 1871.

PLEADING.—COMPLAINT FOR WRONGFUL DETENTION
OF CHATTELS.

In a complaint for the wrongful detention of personal property, an al-

affidavit
Abbott H.S. 3201
19 May 1871.

Scofield v. Whitelegge.

legation of demand and refusal before suit, is not necessary; but an allegation of ownership in plaintiff is necessary.

Alleging detention "from the plaintiff" is not enough.

A complaint which does not aver ownership in the plaintiff is fatally defective, and may be dismissed on motion at the trial.

Appeal from a judgment.

Cyrus Scofield sued James H. Whitelegge, to recover the possession of personal property.

The complaint was as follows:

"The above-named plaintiff, for a complaint in this action, alleges that the above-named defendant has become possessed of and wrongfully detains from this plaintiff, the following property, that is to say: one rosewood Ernest Gabler piano, No. 6604 (Ernest Gabler, maker), of the value of four hundred dollars. Wherefore the plaintiff demands judgment against the said defendant for a return, and for damages," &c.

The answer was a specific denial.

At the trial before Mr. Justice FREEDMAN and a jury, a motion was made to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The motion was granted. The complaint was dismissed, and judgment entered for costs.

The plaintiff appealed.

Oscar Frisbie, for the plaintiff, appellant.

A. H. Reavey, for the defendant, respondent.

BY THE COURT.*—MONELL, J.—The objections of the complaint in this case are, that it does not allege ownership of the property by the plaintiff, or a demand and refusal before suit.

*Present, MONELL, Ch. J., and JONES and SPENCER, JJ.

Scofield *v.* Whitelegge.

The latter allegation is not necessary, where the detention is alleged to be wrongful. In that case a demand and refusal must be proved as evidence of a wrongful detention, but need not be averred.

It is otherwise with the allegation of ownership, or what is its equivalent, a right to the possession of the property. Ownership, or a right to the possession of the property claimed, must be averred as well as proved. Such is the text of the elementary writers (*Grah. Pr.*, 2 ed., 897; *2 Burr. Pr.*, 2 ed., 13), and the books of precedents conform to the text writers (see also *Prosser v. Woodward*, 21 *Wend.*, 205).

The *affidavit* which the Code requires, to obtain a delivery of personal property, must contain an averment that the plaintiff is the owner, or is lawfully entitled to the possession of the property; and it seems to me a complaint would be insufficient without a similar averment. It was contended by the appellant's counsel that the allegation "detains *from* the plaintiff," was sufficient as a pleading, and would let in proof of ownership. It might, perhaps, be implied from such an averment, that it was the plaintiff's property, as otherwise it could not be *wrongfully* detained from him. But facts so essential should not be left for implication; and it would form a bad precedent to allow such loose pleadings to pass.

The plaintiff could have brought another action, or, perhaps, have obtained leave to amend his complaint.

The omission of it was fatal, as it stood, and the judgment dismissing it must be affirmed.

JONES, J., concurred.

Judgment affirmed.

Lindsley *v.* European Petroleum Co.

LINDSLEY *against* THE EUPOEAN PETROLEUM COMPANY.

*Supreme Court, First Department, First District;
General Term, January, 1871.*

TRIAL.—RIGHT TO OPEN AND CLOSE.

In an action on a promissory note, if the answer admits its making and delivery, and sets up an affirmative defense, the defendant is entitled to open and close, on the trial, although the answer deny the other allegations of the complaint; and the refusal of the court or referee to allow him to do so, is error for which a new trial will be awarded.

Appeal from a judgment.

This action was brought by Leonard B. Lindsley and Isaac B. Cotterell, to recover the amount of thirteen promissory notes, made by the European Petroleum Company, to the order of L. E. Lahens, and indorsed by Lahens to the plaintiffs.

The answer of the defendants was as follows:

“The defendants come into court, and answering the complaint of plaintiffs, admit the making, indorsement, transfer and delivery of the said notes, and *deny the other allegations therein contained*,” and then proceeded to set forth an affirmative defense.

Upon a trial before a referee, the defendants’ counsel proposed to open the case, and insisted on his right so to do, on the ground that the burden of the proof was on the defendant, and that the affirmative was with them. The plaintiffs’ counsel objected, and claimed that he was entitled to open and close the case.

The referee decided that the plaintiff was entitled to

Lindsley *v.* European Petroleum Co.

open and close the case ; to which decision defendants' counsel excepted.

The counsel for plaintiffs thereupon opened the case, produced the promissory notes mentioned in the complaint, and rested.

The referee having decided in favor of plaintiffs, the defendants appealed to the general term, upon the foregoing and other exceptions.

Frederic R. Coudert, for appellant, argued as follows, on the point above suggested :

The referee erred in his ruling to the effect that the plaintiffs were entitled to open and close.

I. The defendants specifically admitted all the facts in the complaint contained, that were necessary to the recovery of plaintiffs, viz : "the making, indorsement, transfer, delivery and non-payment" of the notes in suit. The subsequent denial was manifestly intended to dispute the lawfulness of the claim, and nothing more. If the affirmative defense in the answer was established on the trial, then the plaintiffs were not the lawful owners of the notes in suit, and the defendants were not justly indebted on the notes. If no affirmative defense was proven, then the plaintiffs were entitled to judgment, without any proof whatever.

II. It being clear that the affirmative was with the defendants, we submit that the error of the learned referee, in denying them their right to open and close, is a subject of review by the appellate court, and that the defendants on this ground alone are entitled to a new trial (*Huntington v. Conkey*, approved in 31 N. Y., 614; 33 *Barb.*, 218; and see *Davis v. Mason*, 4 *Pick.*, 158; *Brooks v. Barrett*, 7 *Id.*, 98; 8 *Metc.*, 563; *Rolum v. Hanson*, 11 *Cush.*, 44; *Hoxie v. Green*, 37 *How. Pr.*, 97).

III. Nor is it for the defendant to show that the error of the referee prejudiced him. It is for the plain-

Erie Railway Co. *v.* Ramsey.

tiff to prove the negative of that proposition (*Green v. White*, 37 N. Y., 405).

George C. Genet and *James C. Carter*, for respondent,—Argued that the denial of “all other allegations” was sufficient to entitle plaintiffs to the affirmative, and moreover that it was a question within the discretion of the referee, and his ruling thereon would not be reviewed.

BY THE COURT.*—**INGRAHAM, P. J.**—We must decline to look into the other exceptions in the case; but as the referee erred in not allowing defendants to open and close the case, the judgment must accordingly be reversed, and a new trial awarded.

Order accordingly.

THE ERIE RAILWAY COMPANY *against*
RAMSEY.

Supreme Court, First Department, First District;
General Term, November, 1870.

DISBURSEMENTS FOR PRINTING APPEAL PAPERS.

On appeal from an order, the court may allow the successful party, in addition to the costs, the disbursements for printing the papers and points.

Motion to resettle orders.

The defendants brought two appeals to the general

* Present, INGRAHAM, P. J., and G. G. BARNARD, and CARDOZO, JJ.

Erie Railway Co. v. Ramsey.

term—one from an order of the special term, confirming the continuance of the injunction granted therein ; the other, from an order of the special term, refusing to entertain a motion to modify or dissolve the injunction, based upon a new state of facts, arising since the order granting it, because leave to make such motion had not been previously obtained. Both appeals were decided in favor of the defendants, and the orders of special term were reversed with costs, and on November 14, 1870, orders were entered accordingly in the general term ; and each order, so entered, contained this clause, *viz* :

“It is ordered, that such order of the special term be, and the same hereby is reversed, with ten dollars costs, *and disbursements for printing papers and points in such appeal.*”

These orders having been served upon the plaintiffs' attorneys, they gave notice to defendants' attorneys that the orders would be presented to this court, at a general term thereof, to be held at the court-house in the city of New York, on November 21, 1870, for resettlement. In pursuance of this notice, a motion was made on behalf of the plaintiffs, that the orders be resettled, by striking from each this clause, “*and disbursements for printing papers and points in such appeal.*”

Field & Shearman, for the motion.

John H. McFarland, opposed.

BY THE COURT.—INGRAHAM, P. J.—We think that in these cases the disbursements of printing should be paid as a part of the costs of appeal on a motion.

Motion for resettlement denied.

Johnson *v.* Whitman.

JOHNSON *against* WHITMAN.

Supreme Court, First District; Special Term, February, 1871.

ARREST. — FIDUCIARY CAPACITY. — JURISDICTION.— LAW OF PLACE.

A banker who receives a remittance from his correspondent, with instructions to send a draft for the amount to a third person, and acknowledges its receipt subject to such instructions, is liable to arrest if he appropriates it to his own use.

The courts of this State have jurisdiction, in an action brought here, between parties resident in other States, to order the arrest of the defendant for fraud in contracting the debt, &c., if he be found within this State, although by the law of the place of his residence he could not be arrested there for the same cause.*

Motion to vacate order of arrest.

This was an action for fraudulent conversion of the proceeds of certain uncurrent money sent by the plaintiffs to the defendants, with instructions to convert the same into bankable money, and remit by draft to A. Bell & Sons, bankers, in New York City. The defendants acknowledged the receipt of the money by letter dated June 18, 1859, and agreed to remit as directed. They did not remit; but soon after failed in business, and made an assignment for the benefit of their creditors, and notified the plaintiffs thereof by letter

* Compare *Brown v. Ashbough* (40 *How. Pr.*, 226), where it was held that arrest may be ordered of a defendant within the jurisdiction, without reference to where the fraud was committed, or whether the property was ever brought within the jurisdiction. See also *De Witt v. Buchanan* (54 *Barb.*, 31).

Johnson *v.* Whitman.

dated June 28, 1859. Also, that they had given them credit for the amount of the proceeds of the sale of the uncurrent funds, which would be arranged by their assignee. Both the plaintiffs and defendants were bankers, residing and doing business in the State of Ohio. None of the transactions referred to took place in the State of New York. One of the defendants, while temporarily in this State, was arrested upon an order obtained in this action, upon an affidavit setting out the conversion of the money as above stated, and that he, while acting in a fiduciary capacity as agent for the plaintiffs, had fraudulently misapplied the same.

The defendant arrested now moves to vacate the order of arrest upon affidavits setting forth that none of the parties to the action are residents of this State, and that the alleged conversion also took place out of the State—that the alleged misapplication of funds was committed by his partners, he being at the time absent from home; that for a year previous to June, 1859, the plaintiffs had kept an account with the defendants as bankers and brokers, involving transactions of a similar nature; and a transcript of such accounts was annexed.

A. J. Vanderpoel, for the motion.

R. P. Lee, opposed.

BRADY, J.—The plaintiffs sent to the defendants a package of bank notes, issued by the banks of Cleveland, Ohio, of the value of two thousand four hundred dollars, with instructions, per letter, directing them to send their draft therefor to Abrm. Bell & Sons.

The defendants advised the plaintiffs of the receipt of the money and instructions, and in the letter of advice stated that they had remitted, pursuant to instructions.

Johnson *v.* Whitman.

They did not, however, remit, as stated, or account for the money, but used it for their own purposes.

It appears that the parties, prior to that remittance, had business transactions of a kindred character, but it does not appear that any of them remained unfinished when the last remittance was made.

It is assumed from these transactions, that the relation of debtor and creditor was created, and that the defendants did not, therefore, receive the money upon any trust.

This position cannot be maintained. The remittance was for a particular purpose, and was so understood by the defendants. They acknowledged its receipt, as already stated, and advised the plaintiffs that the application of the funds had been made as directed. That such a violation of duty and appropriation of funds as marks the conduct of the defendants, renders them liable to arrest under the provisions of the Code of Procedure, there can be no doubt.

The jurisdiction of this court cannot be doubted, although the parties hereto are residents of another State. The defendant who was arrested, by coming hither, subjected himself to the *lex fori* which prevails in this State; and therefore to arrest, even if, for the charge against him, he could not be arrested at his place of residence.

The doctrine has been declared in a case in which, as in this case, the parties were not residents of this State (Smith *v.* Spinola, 2 Johns., 198; Sicard *v.* Whale, 11 *Id.*, 194). The *lex fori* governs in such cases (City Bank *v.* Lumley, 28 *How. Pr.*, 397). The case of Blason *v.* Bruno 33 *Barb.*, 520, does not conflict with these views.

That case is an authority only for the proposition that an order of arrest upon the charge of fraudulently disposing of property should not be granted, when the

Matter of Thomas.

fraud complained of was not committed in this State, and the property not brought here.

Whether it would not be the better exercise of discretion to refuse to grant an order of arrest in an action between parties residing in the same, but not in this State, is a subject upon which judges may differ.

In this case, however, the order having been granted, the discretion having been, therefore, exercised, and the order being lawful, it cannot be discharged.

Motion denied.

MATTER OF THOMAS.

New York Common Pleas; Special Term, April, 1871.

RES ADJUDICATA.—INVOLUNTARY BANKRUPTCY.

When the petition of an imprisoned debtor, for a discharge from execution, under 2 Rev. Stat., 31, has been refused because his proceedings are adjudged to be not just and fair, in that he failed to include, in his petition and account, property which he had when he was imprisoned, or when his accounts were made up, and part of which he disposed of after his imprisonment, a new petition cannot be presented stating facts explaining or justifying his acts on the former proceeding.

That is not properly new matter, but matter which was in his knowledge during the former trial, and which he might then have urged.

Such a second petition must be dismissed, and the petitioner left to an application to reopen the former proceeding upon proof of good faith in the matters charged upon him in it.

Motion to dismiss the proceedings of the petitioner on the ground of former adjudication.

Matter of Thomas.

Strong & Shepard, attorneys for the judgment creditors; and

Aldace F. Walker, of counsel, for the motion.

Stilwell & Davison, attorneys for the petitioner; and

Elisha W. Chester and *Thomas Darlington*, of counsel, opposed.

JOSEPH F. DALY, J.—The petitioner, Archibald A. Thomas, is charged in execution against the person, and seeks a discharge under the Revised Statutes (2 Rev. Stat., 31, part II., ch. 5, tit. 1, art. 6).

It appears that a similar application had been made by him and denied, before this. It was denied on the ground that the petitioner's proceedings had not been just and fair. It appeared from the examination of the petitioner under such former proceedings, that he was possessed of certain property or interests which he had not put in his schedule or petition. This the judge considered sufficient ground for refusing the discharge.

No appeal was taken from the decision so made, nor was leave to renew obtained. Verbal application for leave to renew was made by petitioner, but the judge refused it on the ground that leave was not necessary.

In the present proceeding, the petitioner includes in his schedule and petition the property he omitted before. On the return of his notice, the creditors who opposed his discharge before, again appear and move for a dismissal of the present proceedings and denial of the petition, on the ground that the decision upon the former proceedings that the petitioner's proceedings were not just and fair, being unappealed from and subsisting, is conclusive upon him, and a perfect bar to any application of this nature.

Matter of Thomas.

The question seems to be novel. The cases relied upon by the creditors are briefly: *Mercein v. People* (25 *Wend.*, 64), where it was held that in the matter of a *habeas corpus*, an adjudication is a bar to proceedings of the same nature involving matters in difference between the parties up to the time of the making of the order.

Matter of Da Costa (1 *Park. Cr.*, 138; S. C., 5 *N. Y. Leg. Obs.*, 294), another *habeas corpus* proceeding, in which it was held that where no new facts are presented, the decision upon a prior proceeding by *habeas corpus* involving the same facts as in the latter is *res adjudicata*.

In *People v. Burtnett* (13 *Abb. Pr.*, 10, note), it was held that the principle of *res adjudicata* is applicable to *habeas corpus* proceedings.

Demarest v. Darg (32 *N. Y.*, 281), where it was held that the order of the court made upon proceedings for the accounting of a receiver, was a bar to the litigation, in a subsequent action, of any matters at issue on such accounting, between parties to such accounting.

The principle of the doctrine of *res adjudicata* may be properly applied to proceedings like the present, as, indeed, it may be to all adjudications before courts and officers, upon issues properly before them for decision.

The language of Senator *PAIGE*, in *Mercein v. People*, is, "Whenevers a final adjudication of an inferior court of record, or of an inferior court not of record, or of persons invested with powers to decide on the property and rights of the citizen, is examinable by the supreme court upon a writ of error or a *certiorari*, in any such case such final adjudication may be placed as *res adjudicata*, and is conclusive upon the parties in all future controversies relating to the same matter."

The chancellor, in the same case, said, the principle

Matter of Thomas.

of *res adjudicata* was applicable to a proceeding upon *habeas corpus*, and that the party suing out the writ ought not to be permitted to proceed *ad infinitum* before the same court or officer, or before another court or officer having concurrent jurisdiction, to review the former decision while the facts remain the same.

The proceedings of the petitioner in the application now before me, are had under the Revised Statutes in respect of "voluntary assignments by a debtor imprisoned in execution in civil causes" (2 Rev. Stat., ch. 5, tit. 1, art. 6). His petition must contain a just and true account of all his estate, real and personal, in law and equity, and of all charges affecting the same, both as such estate and charges existed at the time of his imprisonment, and as they existed at the time of preparing such petition" (§ 4). His petition must be accompanied by an affidavit that the petition and account of his estate are in all respects *just* and *true* (§ 5).

He is to be examined on oath, and if the court is satisfied that the petition and account are correct, and that his proceedings are just and fair, it shall order an assignment (§ 6); and unless the opposing creditor shall be able to satisfy the court that the proceedings on the part of the prisoner are not just and fair, the court shall grant the discharge (§ 8).

The question for the court to pass upon in the proceeding is, whether the petition and account are correct, and whether the petitioner's proceedings are just and fair. The court may consider matter anterior to the imprisonment (Matter of Watson, 2 E. D. Smith, 429), and may undoubtedly review the acts of the petitioner in respect of any property of his, whether stated in his accounts or not.

If property belonging to the petitioner has been disposed of by him, and such fact, or the fact that he has certain property, is concealed in making up his account,

Matter of Thomas.

the court is bound to decide that his proceedings are not just and fair; such a decision is an adjudication upon the only issues involved in the proceeding. It may be reviewed by the appellate court, but if not disturbed it is conclusive upon the petitioner. He cannot commence a new proceeding involving the same facts, and have the same issues retried. But if any new facts are included in his second application, these may be the proper subject of judicial examination. We are met, however, with the former judgment, declaring his proceedings not to be just or fair, and, unless the new matters in the second petition can wholly destroy the force of that judgment, he cannot be discharged.

It is difficult to see how this can be done. The petitioner's proceedings have been decided to be not just and fair, because he failed to include in his petition and account certain property which he had when he was imprisoned, or when his accounts were made up, and part of which he disposed of after his imprisonment.

The fact that his new petition includes that property does not alter the fact that his concealment of it was unfair and unjust on the former proceeding, and that the decision thereon was correct.

It would not even be sufficient (as new matter to base the new proceeding upon) that he should state in his petition facts excusing, explaining, or justifying his acts in the former proceeding. That is not properly new matter, but matter which was in his knowledge during the former trial, and which he might then have urged.

It seems, therefore, that this proceeding must be dismissed, and the petitioner left to an application to re-open the former proceeding, upon proof of good faith in the matters charged upon him in it. As the statute is intended to release a debtor who voluntarily parts with his property to satisfy his creditors, and who

Thurston *v.* City of Elmira.

can show an honest record in his dealings with his property, the application would, no doubt, upon good cause shown, be granted ; the result, otherwise, would be to condemn the debtor to perpetual imprisonment.

Motion granted, and proceedings dismissed.

THURSTON *against* THE CITY OF ELMIRA.

Supreme Court, Sixth District; Special Term, January, 1868.

ASSESSMENTS.—MISJOINDER.

A party against whom a local assessment has been imposed, cannot join with himself all other persons against whom similar assessments have been made, as parties plaintiff in an action to restrain the collection of the tax ; since such a tax gives no lien upon any common property owned by the plaintiffs, but only upon their separate lots. The objection is available on demurrer for defect of parties and for not stating cause of action.

The rule is well settled, that a tax-payer, as a general rule, cannot maintain an injunction suit to restrain the collection of an alleged illegal tax, especially where he has a perfect remedy at law.

The court, in the proper exercise of its equity powers, does not review and correct the errors of subordinate tribunals.

The proceedings of a municipal corporation will not be held invalid because one of the commissioners making such assessments was not a freeholder, or because the work was given to a contractor without exacting a bond.

Demurrer to complaint.

In 1866, the common council of the city of Elmira,

Thurston *v.* City of Elmira.

under the provisions of its charter, paved certain portions of some of its streets with wooden pavement, assessing the expenses thereof upon the property-owners adjoining such improvements.

This action was brought by the plaintiff, Ariel S. Thurston, "in his own behalf, and in the behalf of divers others and numerous persons interested in the questions in the complaint presented by the plaintiff," —to restrain the collection of the entire tax or cost of the pavement, amounting to the sum of twenty-nine thousand dollars.

A demurrer was interposed to the complaint, thus raising an issue of law.

The several questions raised by the pleadings sufficiently appear in the following opinion.

John A. Reynolds, attorney, and *E. P. Hart*, of counsel, for the plaintiffs.

John T. Davidson (City Attorney), for the defendant.

MASON, J.—This suit is in the nature of the old bill in equity to restrain the collection of what is claimed to be an illegal tax or assessment, and to have the assessment declared null and void. The defendant has demurred to the complaint for a defect of parties plaintiff, and also on the ground that the complaint does not state facts sufficient to constitute a cause of action. I take it to be very clear that there is a misjoinder of parties plaintiff.

This tax or assessment gives no lien upon any common property owned by these plaintiffs, but only upon the separate lots of each owner, and parties so situated cannot join in such a suit as this (*Bouton v. City of Brooklyn*, 15 *Barb.*, 375; *Magee v. Cutler*, 43 *Id.*, 239-260; *Warwick v. Mayor of New York*, 28 *Id.*, 210.)

Thurston *v.* City of Elmira.

A demurrer for a misjoinder of plaintiffs is the proper remedy (8 *How. Pr.*, 372; 24 *Id.*, 353; 16 *Id.*, 195).*

Neither the parties named in the complaint, or any other of the parties upon whose separate lots these assessments were made, can join with the plaintiff in this suit.

The rule is well settled, that a tax-payer, as a general rule, cannot maintain an injunction suit to restrain the collection of an illegal tax (Roosevelt *v.* Draper, 23 *N. Y.*, 318; Doolittle *v.* Supervisors of Broome County, 18 *Id.*, 155; Heywood *v.* City of Buffalo, 14 *Id.*, 534; Susquehanna Bank *v.* Supervisors of Broome County, 25 *Id.*, 312). 1st. It is only when it is necessary to prevent a multiplicity of suits. 2nd. When it may lead to irreparable injury. Or, 3rd. When an incumbrance is created upon the land, and when such incumbrance is valid upon the face of the instrument or proceeding sought to be set aside, and extrinsic facts are necessary to be proved in order to establish the invalidity or illegality.

This action cannot be maintained on the ground that it is brought to prevent a multiplicity of suits (15 *Barb.*, 375; 43 *Id.*, 239). No one has sued the plaintiff, or threatened to; and if the defendants should attempt to collect this tax by suit, only one suit against the plaintiff can be maintained, and the law will not permit him, as we have seen, to be the champion of these other tax-payers.

This suit cannot be maintained on the ground of irreparable injury. If the defendants proceed to a sale of the plaintiff's lands, such sale must be for the shortest lease that will pay the assessment (*Laws of 1864*, p. 277, § 7), and such lease is not valid if the assessment is invalid. Section 8 (*Laws of 1864*, p. 278) only makes the certificate or declaration issued by the

* Compare, however, Palmer *v.* Davis, 28 *N. Y.*, 242.

Thurston *v.* City of Elmira.

defendants presumptive evidence that such tax and assessment were legally imposed.

It is questionable whether this suit can be maintained on the ground that it creates a cloud upon the plaintiff's title, for the reason that the complaint does not set out the resolutions and proceedings with such particularity that we can say the defects in the proceedings complained of do not appear on the face of the proceedings. And in the second place, I have not been able to find in the complaint the distinct allegation that the proceedings of the common council are apparently valid on their face.

In the next place, I am inclined to hold that this suit cannot be maintained, for the reason that the plaintiff has a perfect remedy at law.

If the plaintiff's lands are sold, and a lease executed by the defendant to the purchaser, section 8 of title 5 of the defendant's charter declares it shall only be presumptive evidence of the legality of the tax and assessment, and the plaintiff can defend himself against any proceedings to obtain the possession of the land if the tax and assessment are illegal and void; and Judge DENIO, in considering this question in a case like the one under consideration, states the rule with this qualification. He says: "When the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed by the proper officer would be conclusive evidence of title, and the tax was not void on its face, a suit in the nature of a bill *quia timet* will lie" (25 N. Y., 314).

This court, in the proper exercise of its equity powers in a suit like the present, does not, as the plaintiff's counsel seems to suppose, review and correct the errors of subordinate tribunals. It never does this. It will only look into them so far as to ascertain whether, standing as they do, they are valid or not. I have made this remark, as it appears to me that the

Hackett *v.* Belden.

most if not all the matters complained of in this suit are mere irregularities or errors in the proceedings, which, perhaps, might be reviewed upon *certiorari*, but which do not of themselves render the proceedings invalid, when called in question collaterally. These proceedings cannot be held invalid in this suit because W. R. Judson, one of these assessors or commissioners, was not a freeholder (*Porter v. Purdy*, 29 *N. Y.*, 106). Nor can it at all invalidate this assessment because the common council let the contract for this work to Taylor without exacting a bond from him. And I do not think the power of the common council to impose this assessment and tax was taken away from them because the mayor, without authority perhaps, had himself borrowed the money and paid Taylor, according to his contract with him. And so of the other errors complained of. They seem to be irregularities in the proceedings more than anything else.

The defendant in this case must have judgment with costs, upon the demurrer to the plaintiff's complaint, with leave to the plaintiff to amend within twenty days, on the payment of costs.

Judgment accordingly.

*Affirmed,
47 N.Y. 624.*

HACKETT *against* BELDEN.

Supreme Court, Fourth Department, Seventh District; General Term, September, 1870.

ABATEMENT AND REVIVAL.—SATISFACTION.

Although, as a general rule, a cause of action in favor of two partners or joint contractors survives to the survivor, and an action upon it cannot be continued in the name of the personal representative of

Hackett *v.* Belden.

one deceased, nor can such representative be joined in an action, yet, where a judgment recovered by two partners has been satisfied as against one and not as against the other, and the latter dies, the action may be continued in the name of the legal representative of the latter.

Appeal from an order.

Richard and Lawrence Hackett sued Edward Belden upon an account, on which plaintiffs, as partners, alleged defendant to be indebted to them. The facts are particularly stated in the opinion.

E. W. Gardner, for the plaintiffs.

Strong & Shepard, for the defendant.

BY THE COURT.*—TALCOTT, J.—This is an appeal from an order of the Monroe special term ordering that the suit be revived and continued in the name of Gertrude A. Hackett, sole executrix of the plaintiff, Lawrence Hackett, deceased.

The facts, so far as they bear upon the propriety of this order, are as follows:

The plaintiffs, having been copartners, brought an action against the defendant upon an account, claimed to have accrued against the defendant in favor of and in the business of the copartnership during its continuance, and recovered a judgment for three thousand seven hundred and twenty-six dollars and seventy-eight cents, from which the defendant has appealed. Pending the appeal, the defendant procured Richard Hackett, one of the plaintiffs, to execute and acknowledge satisfaction of the judgment, and the satisfaction piece was duly filed in the office where the judgment was filed and docketed.

* Present, MULLEN, P. J., and JOHNSON and TALCOTT, JJ.

Hackett *v.* Belden.

Afterwards, Lawrence Hackett made a motion to have the satisfaction-piece set aside on the ground that it was fraudulent and collusive as against him.

That motion was granted at the Steuben special term, in June, 1869, so far as it affected the interests of the plaintiff, Lawrence Hackett, and it was further ordered that said Lawrence Hackett might proceed to enforce the judgment to the extent of his interest in the same, as though the satisfaction-piece had not been executed.

But the satisfaction was allowed to stand as against Richard Hackett, who had collusively and fraudulently undertaken to satisfy the judgment. Protection was also extended by the same order to the lien of the attorneys for the plaintiff; but this is unimportant for the purposes of the question before us. After the making of the last mentioned order, and whilst Lawrence Hackett was defending against the appeal, he died, leaving Gertrude A. Hackett his sole executrix; and she, after obtaining letters testamentary, made the motion on which the order now appealed from was made. The appellant insists that the suit can only be continued in the name of Richard Hackett, as to whom the fraudulent and collusive satisfaction still stands in full force of record, and he relies upon numerous decisions laying down the undeniable proposition that, in general, a cause of action in favor of two partners or joint contractors survives to the survivor, and that an action upon it cannot be brought or continued in the name of the personal representative of the deceased partner, nor can such representative be joined in the action.

This is clearly the rule at the common law. The rule that an action could be brought or continued only in the name of the party having the *legal*, as distinguished from the equitable interest, was, before the Code, most strictly enforced.

Hackett *v.* Belden.

The common law courts, however, found themselves embarrassed by the attempts of parties to the record to interfere with the rights of the real parties in interest, by collusive settlements, releases, and otherwise, and were accustomed to protect, as far as possible, the rights of assignees and equitable owners, on motion.

The Code, however, has provided that every action must be prosecuted in the name of the real party in interest, intending to abrogate the technical rule of the common law which has been referred to. Since the Code, there can be no doubt but that if the claim in this case had been by the partners assigned to some third party, an action to recover it might have been maintained in the name of such third party. There can be as little doubt that in case one partner releases and assigns all his interest in the assets of the firm to the other, such other may maintain an action to collect a debt due the firm, in his own name. Indeed, this is common practice.

In the case of *Mills v. Pearson* (2 *Hilt.*, 16), the New York common pleas held, that in case of an assignment by one partner to a third person, of the interest of such assigning partner in a claim, an action could not be maintained in the name of the assignee alone, but the non-assigning partner must be joined as co-plaintiff. This was on the express ground that the assignment did not purport to embrace anything but the individual interest of the assigning partner.

In this case, the effect of the order by which the satisfaction was allowed to stand as against Richard Hackett, was to cancel and discharge all the interest of Richard Hackett in the claim, leaving the balance to stand, and leaving Lawrence Hackett the sole remaining party in interest.

By the rule of the common law, the personal representatives of the deceased partner did not succeed to the legal title of the decedent in the copartnership as-

Hackett *v.* Belden.

sets, and in such a case as this a protection against the fraudulent and collusive conduct of the surviving partner could only be found by an appeal to the court of chancery, which, as a protection against the fraud, would have appointed a receiver, or possibly by an application to the equitable powers which a court of law asserted over suits prosecuted before it, and judgments rendered by it. So, also, creditors of the copartnership, though interested in a proper application of the assets of the firm, could not interfere in the prosecution of actions by it, or by one of the parties, to collect the debts due it, except through the aid of a court of equity, by injunction and receiver, in a proper case.

In this case, Lawrence Hackett was the only party interested after the order setting aside the satisfaction as to him and allowing it to stand as to Richard.

The order produced the same effect as though an assignment of all his interest had been made by Richard to Lawrence Hackett, and the interest of Lawrence devolved upon his personal representative to the same extent as though such an assignment had been made to Lawrence in his lifetime, or as though Richard had never had any interest therein. The course of action was one which was not lost or extinguished by death, but survived; and in such case, the court is authorized to allow the action to be continued in the name of the representative or successor in interest of the deceased (*Code*, § 121).

Conceding that the court had power to make the order, its propriety in this case cannot be questioned.

The order must be affirmed with costs.

Order affirmed.

McGuckin *v.* Coulter.

McGUCKIN *against* COULTER.

New York Superior Court; General Term, April, 1871.

DISCHARGE OF MECHANIC'S LIEN.—GENERAL ALLEGATION.—PRESUMPTION.

Pending a reference of an action to foreclose a mechanic's lien, the court cannot properly discharge the lien upon a summary application on affidavits as to the merits.

An owner moving to have a lien discharged, upon the ground that it has not been continued, though a year has elapsed, must aver in his affidavit facts showing this to be the case. A general allegation is insufficient.

If it appear that an order continuing the lien was filed, the making of a new docket will be presumed.

Appeal from an order discharging of record a mechanic's lien.

In September, 1868, the plaintiff, Henry McGuckin, filed with the clerk of the city and county of New York, a notice under the mechanic's lien law, to the effect that he had a claim against the defendant, Julia A. Coulter, on account of work performed and materials furnished upon and in the house and premises on the north-east corner of Ninth-avenue and Sixty-second-street, owned by the defendant; and which had been performed and furnished under a contract with the defendant as such owner.

In December of the same year the plaintiff commenced this action to foreclose the lien; and in February, 1869, the action was sent to a referee to hear and determine.

Within one year from the filing of the notice of

McGuckin *v.* Coulter.

lien, it was continued, by an order of a justice of this court, duly entered.

Upon an affidavit made in behalf of the defendant, setting forth the commencement and reference of the action, and that it appeared by the testimony and proceedings before the referee, that the plaintiff's lien is upon a vacant lot belonging to Julia A. Coulter, on the north-west corner of Ninth-avenue and Sixty-second-street, and that no work or labor was done or materials furnished on said plot by the plaintiff; and that it further appeared that whatever work the said plaintiff claimed to have done, or whatever materials he claimed to have furnished, were done and furnished on an entirely different lot or piece of ground, with an erection upon it; and, also, that the lien had not been renewed according to law; and that more than a year had elapsed since the lien was filed and had never been renewed, a motion was made at special term to have the action discontinued and the lien discharged of record, with a general prayer for further and other relief, &c.

In opposition to the motion, the plaintiff, by affidavit, showed the filing of the lien, the commencement of the action, and its actual pendency before the referee, and annexed a copy of the order of the court continuing the lien. He further claimed that it did appear, and was fully proved before the referee, that the lien filed by him covered the premises owned by the defendant, and the work, labor, and services, and the materials furnished by the plaintiff, and for which he sought to recover, were performed and furnished toward the erection of the building situate on the lot upon which the lien was filed, and of which the defendant is the owner, which proof has not been contradicted by the defendant.

The motion was granted, and an order made dis-

McGuckin *v.* Coulter.

charging the lien of record ; declaring it null and void, and vacating the order continuing the lien.

From this order the plaintiff appealed.

D. McAdam, for plaintiff.

S. B. Noble, for defendant.

BY THE COURT.—MONELL, J.*—It is understood that the order in this case was made upon two grounds: First, that it sufficiently appeared that no work was done nor materials furnished upon the premises designated in the notice ; and second, that the lien docket has not been properly renewed, namely, that it did not appear that a new docket has been made by the clerk, stating the renewal of the order of the court.

Section 10 of the mechanic's lien law (*Laws of 1863*), p. 863), prescribes the various modes in which the lien may be discharged, neither of which was pursued in this case ; and the order discharging the lien in this case cannot, therefore, be sustained, under any provision of the statute.

But it is supposed that, independently of the statute, the court can exercise such control over actions pending in it as to direct their discontinuance for reasons other than such as are specified in the statute, if such reasons are in themselves otherwise sufficient. And such probably is the power of the court ; but the reason must be one applicable to all cases pending in the court, and not peculiar to any class of cases. In other words, the power must be exercised under general rules governing all cases.

In this case, the learned justice who decided the motion assumed to determine upon affidavits a material and perhaps the most material question of fact in the case, and not upon any proof of the fact in the affi-

* Present, BARBOUR, Ch. J., and MONELL and JONES, JJ.

McGuckin *v.* Coulter.

davits, but merely upon the assertion that it *appeared* from the testimony before the referee, without giving the testimony itself.

One of the questions in the action which the referee was empowered to determine, was the very question which the court, upon this motion, undertook to determine in a summary way, upon *ex parte* affidavits and upon hearsay evidence.

That could not be done. It was invading the premises of the referee, who, having got possession of the case, could not be interfered with in that way.

The second ground upon which the decision was placed is equally untenable.

Section 11 of the act provides that liens shall cease after one year, unless, by order of the court, the lien is continued, and a new docket made, stating such fact.

It is not disputed that the order made by this court continuing the lien was in all respects sufficient, both in point of time and manner of making, but, according to the learned justice below, it did not *appear* that a new docket had been made by the clerk.

Upon a motion of this kind, which was not founded upon any of the reasons for a discharge contained in the statute, the burthen was upon the moving party to furnish another reason, sufficient in law, for granting the relief sought. That was not done in this case. The defendant's allegation was merely that "the lien has not been renewed according to law, and that more than a year has elapsed since the lien was filed."

This general allegation, unsupported by any fact, was wholly insufficient. It does not prove any thing; certainly not that a new docket had not been made. And the learned justice must have been of the opinion that the burthen rested on the plaintiff to show a subsisting lien. That might possibly be so if he was the moving party. It is not so, when the owner is seeking to have the lien discharged.

People *ex rel.* Longwell *v.* McMaster.

But apart from this, every presumption is in favor of the performance of official duty. It was for the county clerk to make a new docket, as required by the statute, and the law will presume that he performed his duty.

It was proved that the order continuing the lien was duly filed with the county clerk by the plaintiff. With that the plaintiff's duty ceased. It then became the duty of the clerk to make the entry, and we must intend that he did it (*Hartwell v. Root*, 19 *Johns.*, 345; *People v. Carpenter*, 24 *N. Y.*, 86).

The order should be reversed, with costs.

BARBOUR, Ch. J., and JONES, J., concurred.

Order reversed.

PEOPLE *ex rel.* LONGWELL *against* McMaster.

Supreme Court, General Term, Fourth Department;
March, 1871.

BONDING OF TOWNS.—TAX-PAYERS.—PERSONAL
APPEARANCE.

Under the Town Bonding Act of 1869 (2 *Laws* of 1869, p. 2303, ch. 907, amended by 1 *Laws* of 1870, p. 450, ch. 173; 2 *Id.*, p. 1148, ch. 507), all names upon the tax roll must be counted, including those of persons only taxed for dogs, in ascertaining if the petitioners are a majority in number of the tax-payers.

The appearance before the county judge, under § 2, of tax-payers who desire to join in the petition, must be an appearance in person.

In general, a statute allowing the appearance of a party before a tribunal imports a personal appearance.

Certiorari to review proceedings of a county judge.

People *ex rel.* Longwell *v.* McMaster.

An application was made to the defendant, Hon. Guy H. McMaster, the county judge of Steuben, for the issue of bonds of the town of Bradford, in aid of a railroad company, under the act of 1869. The issue of the bonds having been allowed, the relator, Hosea Longwell, procured this writ of *certiorari* to review the proceedings, upon grounds stated in the opinion.

Ruggles & Little, for relator.

D. Rumsey, for respondent.

BY THE COURT.*—TALCOTT, J.—This *certiorari* brings up the proceedings before the county judge of Steuben county, and his determination and judgment thereupon, in proceedings taken under the act of 1869, amended by the act of 1870, to bond the town of Bradford in said county, in behalf of the Sodus Bay, Corning, & New York Railroad Company.

We have had occasion to discuss the provisions of this act in the case of People *ex rel.* Haines *v.* Smith, County Judge of Ontario, decided at the last November term, and in the case of People *ex rel.* Ogden *v.* Franklin, County Judge of Seneca, decided at the present term. It is sufficient to say here, that in the view we have taken of the statute, it is one which, in effect, authorizes the taking of private property, through the power of taxation, for a supposed public purpose, and, like all other acts of that character, it is essential to the validity of proceedings under it, that its requisitions, at all events in all matters of substance, should be strictly complied with; and the facts of which the county judge is required by the statute to take proof, must be legally proved before him. It must appear, by being proved before the county judge, that the petitioners constitute a majority of the tax-payers of the town, and represent

* Present, MULLEN, P. J., and JOHNSON and TALCOTT, JJ.

People *ex rel.* Longwell *v.* McMaster.

a majority of the taxable property thereof, as appears by the last preceding tax roll, which in this case is the tax roll of 1869. The county judge, in ascertaining the number necessary to constitute a majority of the tax-payers, rejected from the roll of 1869 the names of seven persons whose names appeared upon that roll, and against each of whom was assessed the sum of fifty cents as the owner of a dog, and who were not otherwise taxed.

The requisition of the statute is, that the petitioners shall be a majority of those whose names appear upon the roll as representing a majority of the property. The only intelligible construction of which is, that they shall be a majority in number of those representing (*i. e.*, taxed for) property, and shall also represent a majority of the property taxed (see § 2 of the act).

If, therefore, those seven persons were taxed for property, their names are a part of those the majority in number of which must be petitioners.

It is settled, at this day, in this State, that dogs are property. They are the subject of larceny; and civil actions may be maintained for injury to or conversion of them, as in regard to other domestic animals. It is true these persons cannot under this act help to make up the representations of a majority of the property, because that majority of property must be as appears by the tax-roll, which is the only evidence, and the tax on dogs being specific, as though it were imposed on pianos or carriages, without regard to value, and not *ad valorem*, as other property is assessed, the roll fails to show the value, or any value, so that it cannot aid in making up the majority, as shown by the roll. The county judge, therefore, erred in rejecting from the tax roll the names of these seven persons.

Besides these seven persons, the tax roll contained the names of two hundred and twenty-five who were assessed for property which was valued. The petitions origin-

People *ex rel.* Longwell *v.* McMaster.

ally contained the names of one hundred and twelve of these persons, being less than a majority of the two hundred and twenty-five. During the investigation before the county judge, two of the dog tax-payers and one other person assessed for valued property, appeared before the county judge, and joined in the petition, under section 2 of the act. But counting the names of the dog tax-payers, the whole number of names on the roll was two hundred and thirty-two, of which it required of course one hundred and seventeen to constitute a majority ; and thereupon, a witness appeared and testified that William Smith and John Inscho, two of the tax-payers whose names appeared on the roll assessed for valued property, had authorized the witness to appear before the said county judge, "and to sign their names to the said petition ;" and thereupon, the said witness was permitted to add the names of said William Smith and John Inscho to the petition, against the remonstrances of the contesting tax-payers, who objected to the proceeding upon the ground that said Smith and Inscho had not appeared before the county judge, and expressed a desire to join in the petition. These two names made up precisely the requisite one hundred and seventeen ; and the question is, whether, under the circumstances, they could properly be counted as petitioners. The only authority for adding to the number of petitioners after the investigation before the county judge has commenced, is to be found in section 2 of the act, which provides that if it shall appear that the said petitioners, "and such other tax-payers of said town as may then and there appear before him, and express a desire to join as petitioners in said petition, do represent a majority," &c., he shall so adjudge and determine.

In general, where the appearance of a party before any tribunal is spoken of, the expression imports a personal appearance. Formerly, all persons who were

People *ex rel.* Longwell *v.* McMaster.

required to appear in court must appear in proper person, "for the command of the writ being to appear, was always intended to be in proper person" (*Bac. Abr.*, title Attorney, B; *2 Coke's Inst.*, 249). The right to appear in court by attorney is of statutory origin, and can be only by an attorney at law, except in justices' courts, and that by virtue of the statute (*3 Rev. Stat.*, 5 ed., 433, § 42).

Independent of the general rule, the statute in this case seems to contemplate a personal appearance. The parties are to appear before the judge, and "express a desire," &c. It is not unlike the acknowledgment of a deed, which it has never been claimed can be done by proxy. To allow any person to appear, and on his mere assertion, though under oath, that he was authorized to express this desire on the part of any number of persons named in the roll, would be dangerous to the rights of tax-payers. If two necessary names can be thus supplied, so may fifty or one hundred. However false or mistaken the assertion of authority may be, there is no adequate remedy, and the property of the tax-payers of a town may in this manner be irretrievably mortgaged for the benefit of a railroad company, against the will of a clear majority in number and valuation of property, which is far from the intent of the legislature. This is a mode of collecting the suffrages of the tax-payers, and they cannot, we think—at all events, so far as they are to be given in the presence of the county judge—be expressed by proxy. It follows, that the names of the two tax-payers added to the petition by the witness Munson, on the trial before the county judge, must be deducted from the count; and this leaves less than a majority of those whose names appear on the roll as assessed for property.

The determination and judgment of the county judge must, therefore, be reversed.

Ferris v. Aspinwall.

FERRIS against ASPINWALL.*Court of Appeals; March, 1871.***APPEALABLE ORDER.**

The Code does not allow an appeal to the court of appeals from an order sustaining or overruling a demurrer. Final judgment must be given upon the demurrer before the court of appeals can review it.

Motion to dismiss an appeal.

The action was brought by Madison J. H. Ferris against Benjamin Hart, Lloyd Aspinwall, G. G. Howland, and others, forming "The National Express and Transportation Company."

The defendant Aspinwall, in his answer, besides making a general denial, set up certain new matter, to which plaintiff demurred. The special term overruled the demurrer, and ordered judgment for the defendant, with costs. On appeal to the general term the order of the special term was affirmed, and the plaintiff appealed to this court. Defendant's counsel now moved to dismiss the appeal.

John E. Burritt, for the motion,—Cited *Adams v. Fox*, 27 N. Y., 640; *Paddock v. Springfield Fire & Marine Ins. Co.*, 12 *Id.*, 591.

R. S. Guernsey, opposed.—I. The decision is appealable as an order, under subdivisions 2 and 4 of section 11 of the Code. (1.) It affects a substantial right, and in effect and in fact determines the action. The decision

Ferris *v.* Aspinwall.

overruling the demurrer disposed of the issues of fact. The defenses demurred to were in *bar* of the action. When the plaintiff demurs to an answer which is a *bar* to the action, and the demurrer is overruled, the defendant is entitled to judgment absolute (*Wightman v. Shanklin*, 18 *How. Pr.*, 79; *McCormick v. Pickering*, 4 *N. Y.* [4 *Const.*], 276; *Grah. Pr.*, 761; 2 *Wend.*, 632), unless it appears that the plaintiff might prevail on the issues of fact joined in the action (*Belknap v. McIntyre*, 2 *Abb. Pr.*, 366). In the case at bar the plaintiff could not possibly prevail on the issues of fact after the absolute defenses demurred to were held good as a bar. (2.) Again, judgment absolute *was ordered* for the defendant on the demurrer, with costs, and plaintiff could not proceed any further in the action. (3.) Had the order overruling the demurrer been *reversed* by the general term, it would not have been appealable, as the issues of fact were yet to be disposed of (*Paddock v. Springfield Fire & Marine Ins. Co.*, 12 *N. Y.* [2 *Kern.*], 591).

II. If it is not appealable as an *order*, it is as a *judgment*. It was the final determination of the rights of the parties (§ 245). (1.) A hearing of a demurrer is a trial (§ 252), and a decision thereon is a judgment. A demurrer is heard at special term as a trial, and an appeal from an order overruling a demurrer is heard at general term as an appeal from a judgment, and the same costs are allowed at special term as on a trial, and same costs at general term as on an appeal from a judgment (*Baldwin v. U. S. Tel. Co.*, 6 *Abb. Pr. N. S.*, 405; *Small v. Ludlow*, 1 *Hilt.*, 307; *Hendricks v. Bouck*, 2 *Abb. Pr.*, 360). (2.) Nothing further remained necessary to be done by the court to complete the judgment under section 269. No question could arise that might be further litigated in the action. It was final. The taxation of costs by the clerk, and the filing of the judgment roll, were merely ministerial (*Mitchell*

Ferris *v.* Aspinwall.

v. Weed, 6 *How. Pr.*, 127). In the case of *Morris v. Morange* (4 *Abb. Pr. N. S.*, 447), this court held that a decree, in an action of foreclosure, directing a sale and a judgment for a deficiency, is a final judgment, and appealable as such to this court. (3.) "An appeal lies to the court of appeals from a judgment of the general term rendered upon argument affirming a final judgment of any kind, if the latter is an actual determination of a court of record, and not merely rendered upon default" (*Lahens v. Fielden*, 15 *Abb. Pr.*, 177).

III. If the legal questions that arose and were decided on this demurrer cannot be reviewed in this court as the case now stands, the plaintiff must, after the entry of judgment of special term, take another appeal to the general term, which must then *pro forma* again affirm the judgment, with costs (thus making two bills of costs of appeal), and, after the entry of that judgment of affirmance and for costs of appeal, take an appeal to this court. The return to this court now contains all that it would *then* contain, except a *statement* of the *amount* of costs for which judgment was entered. In the absence of any positive law requiring it, such a proceeding would be too absurd to be held necessary or proper.

BY THE COURT.—ALLEN, J.—The appeal is premature, as no judgment has been entered in the action.

The Code gives an appeal from the special to a general term of the supreme court, from an order sustaining or overruling a demurrer (*Code*, § 349). But in defining and regulating the jurisdiction of this court, there is no similar provision.

The decision of the supreme court upon the demurrer cannot be reviewed except by an appeal from the judgment, and upon such appeal any intermediate order involving the merits, and necessarily affecting the judgment, may be reviewed (*Code*, § 11). The order is

Henderson *v.* Spofford.

not included in any of the classes of orders from which an appeal is allowed to this court. Final judgment upon the demurrer must be given before it can be reviewed here (*Adams v. Fox*, 27 N. Y., 640; *Paddock v. Springfield Fire & Marine Ins. Co.*, 12 N. Y. [2 *Kern.*], 591).

The appeal must be dismissed, with costs of the appeal to the time of the motion.

All the judges concurred.

Appeal dismissed, with costs.

*affirmed,
59 N.Y. 131.*

HENDERSON *against* SPOFFORD.

*New York Common Pleas; General Term, January,
1871.*

PILOTAGE.—ACT OF CONGRESS.

Notwithstanding the United States pilotage act (*Act of Congress of July 25, 1866*), sea-going vessels in the harbor of New York are subject to pilotage under the State law.

The amendment to the act of 1866, passed February 25, 1867, is a concession, to the States, of the powers as exercised by them through laws existing at the time of the passage of the original act.

Appeal from a judgment.

The facts appear in the opinion.

Thomas H. Hubbard, for the plaintiff, respondent.

E. Cooke, for the defendant, appellant.

ROBINSON, J.—This is an appeal from a judgment

Henderson *v.* Spofford.

rendered in favor of Joseph Henderson, the respondent, in the first district court of the city of New York, on February 16, 1870, for thirty-eight dollars and eighteen cents, besides costs, for fees for pilotage out of the port of New York, in December, 1869, of a sea-going vessel owned by the appellants, Paul N. Spofford, Joseph L. Spofford, Gardner Spofford, and Clinton Hunter.

The plaintiff was a pilot by way of Sandy Hook, duly licensed by the board of commissioners of the State, and as the vessel was leaving for San Domingo, offered his services to the master and owners to pilot her to sea, but they refused to take or employ him in that capacity, and the vessel proceeded to sea without having on board any pilot of the port.

The right to this recovery is only contested upon the ground that the State legislation, "to provide for the licensing and government of the pilots and regulating pilotage of the port of New York" (*Laws of 1853*, ch. 467, p. 921, with the amending acts of 1854, ch. 196, p. 459, of 1857, ch. 243, p. 500, of 1863, ch. 412, p. 705, of 1865, ch. 137, p. 244), so far as it related to sea-going steam vessels (including the *Tybee*), was superseded and repealed by the act of Congress passed July 25, 1866, which provided that "every sea-going steam vessel, now subject or hereby made subject to the navigation laws of the United States, and to the rules and regulations aforesaid, (of which the *Tybee* was one), shall, when under way, except upon the high seas, be under the control and direction of a pilot licensed by the inspector of steam vessels," and having thus become *functus*, and made inoperative, was not resuscitated or brought into effect by the amendment to the act of 1866 by the act of Congress passed Feb. 25, 1867, which contained a proviso in these words, "provided, however, that nothing in this act (that of 1866), or in the act of which it is amendatory, shall be con-

Henderson *v.* Spofford.

strued to annul or affect any regulation established by the existing laws of any State requiring vessels entering or leaving a port in such State to take a pilot duly licensed or authorized by the law of such State, or of a State situate upon the waters of the same port." Such a specific requirement was contained in the act of this State (*Laws of 1853*, ch. 467, § 29, as amended by *Laws of 1857*, ch. 243), which provided that "all vessels sailing under register, bound to or from the port of New York, by way of Sandy Hook, shall take a licensed pilot; or, in case of refusal, the master himself, or the owner or consignee, shall pay the said pilotage, as if one had been employed."

The point taken by the appellants cannot be sustained. If such a construction should be given to the amendment and proviso contained in the act of 1867, it will readily be perceived that it would be entirely inoperative; for, if the act of 1866 abolished or wholly repealed all State laws, and absolutely superseded any State legislation which required vessels entering or leaving a port of the State to take a pilot licensed by the law of such State, no State law could either be passed or remain operative as against the laws of Congress while the act of 1866 remained in force, and at the time of the passage of the amendment of 1867 there could be no such "existing law of any State," and the proviso would be of no effect. But "*benigne facienda sunt interpretationes chartarum ut res magis valeat quam pereat*," and the amendment of 1867 is to be read and construed as if it had been originally incorporated in the act when passed in 1866, except so far as it might be construed to act retrospectively so as to affect acts already done, or rights acquired under the original act; and such an amendment would not only relieve against penalties or forfeitures incurred under the original act, but give effect

Wilson *v.* Mills.

to contracts made in contravention of the provisions so amended.

Considering the relation of the State and Federal governments, and the rights of the State government to pass laws on the subject of pilotage which are to prevail until the general government has, under its constitutional powers, occupied the particular subject of legislation, or has assumed exclusive control of the subject, the amendment of 1867 is but a relaxation of the stringency of the act of 1866, and a re-concession to the States of this particular power as exercised by them through laws existing at the time of the passage of that act.

Such is the spirit of the law, and its intent seems clearly demonstrated. Were this less manifest, by the rule of construction contained in the above quoted maxim, effect is to be given to it rather than that it should be held impotent to any purpose, and, construing it as if passed as a portion of the act of 1866, the recovery in this action should be sustained.

The judgment should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

WILSON *against* MILLS.

New York Common Pleas; General Term, May, 1871.

PARTIES.—PILOTAGE LAWS.

An action to recover pilotage where the pilot's services were refused, may be brought by the pilot in his own name.

Under the New York Pilotage Laws (1 *Laws of 1857*, p. 500, ch. 248),

Wilson *v.* Mills.

and the regulations of the commissioners of pilots, a pilot offering services which are refused, may recover, notwithstanding the offer and refusal were beyond the territorial jurisdiction of the State.

The case of *Peterson v. Walsh*, 1 *Daly*, 182, overruled.

To the pilot's offer of services, the master replied that they wanted a pilot when they reached pilot ground, but kept on his course, and entered port without a pilot. *Held*, that this was a sufficient refusal to sustain an action.

Appeal from a judgment.

William L. Wilson, the plaintiff, a duly licensed pilot for the port of New York, on July 24, 1870, offered his services to the schooner H. H. Thompson, then bound to said port.

At the time of the offer the schooner was not far from Barnegat, and, it was claimed, not on pilotage ground.

The evidence as to the position of the vessel, and also as to the limits of pilotage ground, was conflicting.

The master of the vessel, on being hailed, replied that he would want a pilot "when they got on pilotage ground ;" but kept his course, and though the pilot-boat followed a short time, the vessel entered port without a pilot.

This suit was brought against Stephen H. Mills & John L. Merrill, agents and consignees of the vessel, for the pilotage fees. On the trial defendants moved for a nonsuit, on the grounds, 1. That the action should have been by the commissioners of pilots. 2. That plaintiff's testimony showed no refusal such as is contemplated by the act. 3. That the master was not bound to accept the offer at the time it was made.

The motion was denied, and judgment rendered for plaintiff; and the defendants appealed.

D. & T. McMahon, for defendants, appellants.

Wilson *v.* Mills.

Thomas H. Hubbard, for plaintiffs, respondents,—
I. The pilot fees belong to the pilot, and he alone can sue.

II. The facts clearly constitute an offer and refusal, under the act.

III. The preponderance of evidence shows that the offer was made on pilotage ground, and the fact that the master did not suppose that he had then reached it is no defense. *Cisco v. Roberts* (36 *N. Y.*, 292), is decisive against the objection that the refusal was beyond the jurisdiction of the State (citing, also, *Story on Confl. of L.*, §§ 620-625; *Scoville v. Canfield*, 14 *Johns.*, 338; *Van Schaick v. Edwards*, 2 *Johns. Cas.*, 355; 1 *Kent Com.*, *368, and 406, 9 ed.; *Vattel's Law of N.*, 128, ed. of 1854, § 289). And the cases of *Steamship Company v. Joliffe* (2 *Wall.*, 450), and *Henderson v. Spofford* (*Ante*, 140), are decisive of the constitutionality of the New York statute.

LARREMORE, J.—The act to amend the pilot laws, passed April 3, 1857 (*Laws of 1857*, ch. 243, § 29), provides that “all vessels sailing under register, bound to, or from the port of New York, by the way of Sandy Hook, shall take a licensed pilot, or in case of refusal to take such pilot the master shall himself or the owner or consignee shall pay the said pilotage as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services to such vessel.”

It was alleged in the complaint, and not denied by the answer, that plaintiff was the *first* pilot who offered his services to said vessel.

This disposes of one of the questions raised by the argument.

That the conduct of the master amounted to a refusal within the act can admit of but little doubt; and

Wilson *v.* Mills.

his misapprehension as to the location of pilot ground, would not bar plaintiff's recovery.

The main question presented is whether the master was bound to accept plaintiff's services at the time they were offered.

Nothing appears in the case to show that "pilot ground" is clearly defined and prescribed by law.

On the trial witnesses differed as to the precise location, and the testimony on the point being conflicting, the decision of the question thereon cannot be reviewed on appeal.

But it is claimed on the part of the appellant (under the authority of *Peterson v. Walsh*, 1 *Daly*, 182), that the place where such offer and refusal were made, being more than a marine league beyond the State lines, the court has no jurisdiction in the premises; that the action being for a penalty under the law of the State, and strictly local in its character, there can be no recovery for an offense under it committed beyond the territorial jurisdiction of the State.

Since that decision was rendered, the case of *Cisco v. Roberts* (36 *N. Y.*, 292), has been determined by the court of appeals, wherein it was held that this question "is not an issue as to the relative boundaries of State and Federal jurisdiction," that "the regulations of port pilotage stand substantially on the same footing with our quarantine laws," and that "it is the right and duty of the State, by appropriate legislation to guard the public health, and the security of general commerce, and to provide against the dangers to which every maritime people are exposed, by intercepting and averting them *on the sea without the bounds of exclusive territorial dominion.*"

The board of commissioners of pilots are empowered by section 12 of said act, to make, promulgate, and enforce new rules and regulations not inconsistent with the laws of this State or of the United States.

Hatch *v.* Fogerty.

It would appear, therefore, that a pilot in pursuance of such rules and regulations might lawfully claim pilotage for services rendered beyond the territorial limits of State jurisdiction.

Thus, the exercise of such right, as well as the correction of its abuse, are dependent upon the legislation of the board of commissioners of pilots.

That such was the intention of the act in question, the decision in *Cisco v. Roberts* fairly indicates.

The judgment appealed from must be affirmed with costs.

CHARLES P. DALY, Ch. J., and J. F. DALY, J., concurred.

Judgment affirmed.

HATCH *against* FOGERTY.

New York Superior Court, General Term; January, 1871.

ATTORNEY AND CLIENT.*

The fidelity of an attorney to his client's interests forbids his trafficking, in the smallest degree, with such interests, by collusion or otherwise,

* On May 1, 1871, the judges of the court of appeals promulgated the following

RULES REGULATING ADMISSION TO THE BAR.

The judges of the court of appeals, pursuant to the provisions of chapter 486 of the *Laws of 1871*, ordain and establish the following rules and regulations in relation to the admission of persons hereafter applying to be admitted as attorneys, solicitors, and counselors in the courts of this State:

Hatch *v.* Fogerty.

with persons who, in respect to such interests, have occupied an attitude of hostility towards his client.

If he has advised or assisted the client in proceedings, he cannot afterward use the knowledge he has acquired, to secure a pecuniary benefit to himself, adverse to the client's interest, by an attack on

I. No person shall be permitted to practice as an attorney, solicitor, or counselor in any court of record in this State, without a regular admission and license by the supreme court at a general term thereof. To obtain such admission and license, except in cases otherwise provided for by said act, the person applying must be examined under the direction of the court. The time for the examination of persons applying to be admitted as attorneys, solicitors, and counselors, shall be Thursday of the first week of each general term in the several departments; and the time for taking the oath of office shall be on such day thereafter as the court may direct.

The examinations shall in all cases be public, and, unless conducted by the judges of the court, shall be by not less than three practicing lawyers of at least seven years standing at the bar, to be appointed by the court.

II. To entitle an applicant to an examination, he must prove to the court :

1. That he is a citizen of the United States, and that he is twenty-one years of age, and a resident of the department within which the application is made, and that he has not been examined in any other department for admission to practice, and been refused admission and license within three months immediately preceding, which proof may be by his own affidavit of the facts.

2. That he is a person of good moral character, by the certificate of the attorneys with whom he has passed his clerkship, but which certificate shall not be deemed conclusive evidence, and the court must be satisfied on this point after a full examination and inquiry.

3. That he has served the clerkship or pursued the substituted course of study prescribed by the rules, as requisite to an examination. The clerkship may be proved by the certificate of the attorneys with whom the same was served, or, in case of their death or removal from the State, by such other evidence as shall be satisfactory to the court.

The proof of any time of study allowed as a substitute for any part of the clerkship required by these rules shall be by the certificate of the teacher or president of the faculty, under whose instructions the person has studied, together with the affidavit of the applicant; the proof must be satisfactory to the presiding judge of the court, who

Hatch *v.* Fogerty.

the proceedings, even should it appear that such proceedings were wrongful.

Appeal from a judgment.

alone shall make the order allowing a deduction from the regular term of clerkship by reason of such studies.

III. No person shall be admitted to examination as an attorney, solicitor, or counselor, unless he shall have served a regular clerkship of three years in the office of a practicing attorney of the supreme court, after the age of seventeen years.

IV. It shall be the duty of the attorney with whom the clerkship shall be commenced to file a certificate in the office of the clerk of the court of appeals, certifying that the person has commenced a clerkship with him, and the clerkship shall be deemed to have commenced on the day of the filing of the certificate. A copy of the certificate, certified by the clerk of the court of appeals, with the date of the filing thereof, shall be produced to the court, at the time of an application for examination.

V. When a clerkship has already commenced, or shall have commenced before these rules shall take effect, the certificate required by the preceding rule, verified by the affidavit of the attorney, stating the time of the actual commencement of such clerkship, may be filed at any time before November 1 next.

VI. It shall be the duty of an attorney to give to a clerk, when he shall leave his office, a certificate stating his moral character, the time of clerkship which he has passed with him, and the period which has been allowed him for vacation.

Not more than three months shall be allowed for vacations in any year.

The term of clerkship will be computed by the calendar year, and any person applying for admission, whose period of clerkship shall expire during the term at which the application shall be made, will be admitted to examination at the customary day of the same term.

VII. Any portion of time, not exceeding one year, actually spent in regular attendance upon the law lectures in the university of New York, Cambridge university, or the law school connected with Yale college, or a law school connected with any college or university of this State, having a department organized with competent professors and teachers, in which instruction in the science of law is regularly given, shall be allowed in lieu of an equal period of clerkship in the office of a practicing attorney of the supreme court.

Hatch v. Fogerty.

In August, 1851, the plaintiff's testator contracted to sell to one Willock certain lots in this city, and agreed to make advances in money to assist Willock in building; and when the buildings were enclosed, Hogan was to convey the lots to Willock, and Willock was to execute a mortgage to Hogan for the purchase money and advances.

The contract contains the following provision:

"It is furthermore agreed and understood, that if the said Willock refuse or neglect to complete the said intended houses, or if the diligent prosecution of the work thereon shall at any time after the date of these presents be suspended for ten days, then, and in such case, said Hogan shall have the right to insist on an immediate repayment of all the advances he shall have made, together with interest thereon; and he also is hereby authorized in such case to sell, at public or private sale, all the right, title, interest, and estate of the said Willock in and to the said premises, and to apply the proceeds of such sale to the payment and satisfaction of the expenses of such sale, and of all claims and demands due, or thereafter to become due, which the said Hogan may have against the said Willock for or upon account of the premises; and if any surplus should remain, the same is to be paid to said Willock. The said Hogan is, however, to give the said party one week's notice of his intention to make such sale."

Willock took possession of the lots and began

VIII. Persons who have been admitted and have practiced three years as attorneys in the highest court of law in another State may be admitted, without examination, to practice as attorneys, solicitors, and counselors in the courts of this State. But such persons must have become residents of this State before applying for admission, and must bring a letter of recommendation from one of the judges of the highest court of law in the State from which they came.

IX. These rules shall take effect on June 1, 1871.

Hatch *v.* Fogerty.

building. Subsequently, and in December, 1852, Hogan having claimed that Willock had broken the contract, employed, as was alleged, the defendant, John B. Fogerty, who is an attorney at law, as his attorney, to acquire or extinguish Willock's interest in the lots, under the provision contained in the contract. For this service Fogerty, as was also alleged, was paid by Hogan.

Fogerty proceeded to foreclose the contract by a public sale, pursuant to notice to Willock, at the Merchants' Exchange, of all Willock's right, title, and interest in the lots held by him under the contract. Hogan became the purchaser at the sale, and entered into and has continued in possession, claiming title under such purchase.

There was other employment of Fogerty by Hogan, in controversies connected with the lots—such as evicting a person in possession of one of the lots; resisting the claims of judgment creditors of Willock, and of mechanics having liens for work or material; and especially, Fogerty was employed by Hogan, as was also alleged, to procure for Hogan from Willock a full release of all claims of Willock against Hogan, under the contract.

Such a release was procured by Fogerty, but for purposes, as alleged by Fogerty, as hereafter stated. And for his services under these various employments, including, as was alleged, his employment to procure the release, he was paid by Hogan.

It was alleged by Fogerty, and was found as a fact by the court, in regard to the release, that Fogerty was employed by Hogan, with the concurrence and assent of Willock, to take such proceedings as would be necessary to extinguish the claims of the creditors and lien-holders of Willock against the property; and for that purpose only, *and not otherwise*, he did procure the release from Willock, and that it was procured

Hatch *v.* Fogerty.

upon the express condition that the same should not at any time be delivered to Hogan, and that it should not in any manner affect the claim or interest of Willock to the premises, or against Hogan, upon the contract.

Hogan continued in the undisputed possession of the premises under this purchase from December, 1852, until some time in June, 1859, a period of nearly seven years, when an action was commenced against Hogan, by or in the name of Willock, by Ga Nun, Jordan & Bain, his attorneys; in which action Willock demanded a deed from Hogan of the premises, pursuant to the terms of the contract, and an accounting by Hogan of the rents or profits of the premises during the nearly seven years he had held possession.

The ground upon which that action was founded was, that the sale at the Merchant's Exchange, which had been conducted by Fogerty, had not extinguished Willock's interest in the premises, or his rights under the contract. Hogan appeared in that action, by John M. Hedley, his attorney, and set up in his answer, as a defense, the foreclosure sale, which had been conducted by Fogerty, and also the release which it was claimed that Fogerty had procured from Willock to Hogan, of all his (Willock's) interest in the premises, and of all claim against Hogan under the contract; and which sale and release he claimed was a bar to Willock's action.

Pending that action, and before there had been a trial of the issues, Hogan died, and the action was afterward continued in the name of his executor, and was sent to a referee, to be by him heard and determined.

On the trial of that action, Fogerty was examined as a witness for, and on behalf of Hogan, and, amongst other things, testified to the purpose, as found by the court, in respect to the release from Hogan, namely, that it was procured for the purpose of defeating the

Hatch *v.* Fogerty.

claims of judgment and lien creditors of Willock to the premises, and for no other purpose, and was not intended to be delivered to Hogan, or in any manner to affect the rights of Willock to the premises, or his interest under the contract. Fogerty upon that examination made no disclosure of any interest in himself in that action, and it was not then known to the plaintiff in this suit that Fogerty at that time, and even before the commencement of that action, had a large interest in the result of the action.

In ignorance of any such interest, and influenced by the testimony Fogerty had given of the purpose of the release, the plaintiff, in May, 1862, compromised, and settled that suit, paying to Ga Nun, Jordan and Bain, the attorneys, the sum of three thousand dollars in satisfaction of the claim.

After such settlement had been effected, Fogerty commenced an action *in his own name*, as plaintiff, against Ga Nun, Jordan and Bain, in which he alleged that he had retained and employed them to prosecute the action of Willock against Hogan, and that they had collected in such action a sum of money, over and above their costs, which they had refused to pay to the plaintiff Fogerty.

Upon the trial of that action by a referee it was proved, and the referee, in accordance with such proof, found as a fact that the defendants, Ga Nun, Jordan & Bain, were retained by Fogerty to prosecute the claim of Willock against Hogan. That, previous to such retainer, Willock had agreed that Fogerty should receive *two-thirds* of the amount recovered; that Ga Nun, Jordan & Bain, took the claim to prosecute upon the retainer of Fogerty with full knowledge of his agreement with Willock, and had received the sum of three thousand dollars upon a settlement of the suit. And the referee gave judgment in favor of Fogerty, as agent, against Ga Nun, Jordan & Bain, for eight hun-

Hatch *v.* Fogerty.

dred and eighty-six dollars and sixty-six cents, being the balance in their hands, after deducting their costs and charges, and seven hundred dollars, which had been paid by them to Willock. For a report of that case, see 2 *Robt.*, 319.

Under these circumstances Roswell D. Hatch, the plaintiff in this action, as the executor of Hogan, brought this action against Fogerty, to recover the amount he had received from Ga Nun, Jordan & Bain, in his suit against them, on the ground that his relation to Hogan as his attorney and counsel in foreclosing Willock's rights and interests under the contract with Hogan, and also in obtaining the release from Willock, would not allow of his becoming, or being interested in an adverse claim of Willock against Hogan, growing out of the contract he had undertaken to foreclose, and which claim had not been extinguished by the foreclosure proceeding.

Fogerty alleged in his answer in this action, and the court found as facts :

That after the making of the contract, Willock entered into possession of the lots and proceeded with the erection of the buildings mentioned in the contract, and that Hogan made certain advances to Willock, as provided for by the contract. That the defendant Fogerty then was, and ever since has been, an attorney and counselor at law in the courts of this State, licensed and authorized as such to practice in the courts of this State, and so holding himself out to the world to practice as a regular profession, and as such was employed and retained by Hogan to do and perform certain acts in regard to said contract, and said premises. That from the fall of the year 1852, Fogerty had also been the attorney and counsel of Willock. That at the time last mentioned, Fogerty was employed by Hogan, with the concurrence and assent of Willock, to extinguish the claims of one Hamilton Nesbitt, and of certain lien-

Hatch *v.* Fogerty.

holders in and to the premises, and did so extinguish the same, and for that purpose, and not otherwise, did procure from Willock the release mentioned and set forth in the complaint; but the said release was executed by Willock upon the express condition that the same should not be delivered to Hogan, or affect the claims or interests of Willock in, or to the premises, or as against Hogan; and Fogerty was not employed or retained by Hogan to extinguish the claims or interest of Willock for any purpose other than as above stated; and in accordance therewith, and not otherwise, Fogerty took the proceedings mentioned and set forth in the complaint.

It was further alleged in the answer, and found as facts by the court:—That in April, 1859, Willock was indebted to Fogerty in the sum of twelve hundred dollars, for services theretofore rendered by Fogerty to and for Willock; and Fogerty did thereupon in full payment of said indebtedness take from Willock two-thirds of Willock's claim against Hogan, and thereupon, in consideration thereof, did wholly remit and satisfy the said indebtedness of Willock.

It was further found as a fact:—That Fogerty did not, in violation of his duty and obligations as such attorney and counsel for Hogan, or in contempt of the court, or of the obligations imposed on him as an attorney and counselor of the court, give to Willock advice, or purchase or take from him an interest in his claim against Hogan, or in or to the premises, or instigate Willock to bring said action, or make the purchase from Willock with the intent of prosecuting the said action against Hogan, for his own gain or advantage, or in violation of the statute in that case made and provided.

Upon these facts the judge rendered judgment in favor of the defendant.

Hatch *v.* Fogerty.

The plaintiff, having excepted to the findings of law and fact, appealed.

E. P. Cowles and *Roswell D. Hatch*, for the appellant and plaintiff.

William Fullerton and *John B. Fogerty*, for the respondent and defendant.

BY THE COURT.*—*MONELL, J.*—Upon the argument of this appeal the appellant's counsel was understood to rest his right to recover, not exclusively, but chiefly, upon the ground, that the delicate and confidential relation of attorney and client, which had existed between these parties, would not allow the respondent to take or receive any interest in, or benefit from any claim which Willock might have or assert under his contract with Hogan, which had its foundation in the insufficiency of the proceedings instituted and conducted by Fogerty, for his client.

The counsel, however, was not understood to abandon the ground that the benefit which the respondent had derived from the Willock suit against Hogan, was in consequence of his own lack of skill and correct judgment, in instituting and conducting the proceeding he was employed to institute and conduct, to extinguish the rights and interests of Willock under the contract.

The mode adopted by the respondent to extinguish such rights and interests was by a public sale, after notice, in pursuance of the provisions of the contract.

It is certainly very questionable whether such a sale, although authorized by the contract, was, or could be made effectual to foreclose the contractor's interests. The question is left open and undecided in the case of *Chase v. Hatch* (4 *Robt.*, 89), which was upon a similar

* Present, *MONELL, JONES, and SPENCER, JJ.*

Hatch *v.* Fogerty.

contract, but with an intimation that the contractor is not shut out by such a sale ; and may upon a sufficient excuse be relieved from the forfeiture.

The contract in this case provided, that, if Willock refused or neglected to complete the houses, or diligently to prosecute the work, or if he suspended the work for *ten days*, Hogan might demand payment of his advances, and, upon refusal to pay, might sell at public or private sale all of Willock's interest in the premises.

The forfeiture under the contract on the part of Willock, and the right on the part of Hogan to rescind, rested wholly upon the *ten days'* delay. If the delay in fact occurred, Hogan could at once sell. But in what manner, or by whom, was that fact to be determined ? Could Hogan's saying or claiming that it had occurred be sufficient, and would that conclude Willock, and forever preclude his disputing the fact ? Assuredly not. The right to sell was unquestionable ; but it was necessarily a sale at the risk of being set aside, if it should afterwards be made to appear that there had in fact been no default, or that it had become impossible to perform, either by the act of God, or of the law, or for any other sufficient reason.

The sale, therefore, under the power contained in the contract, was effectual only so far as it put Willock out and Hogan in possession of the premises, and then cast the burden upon Willock of showing, if he could show it, that there had not been a default, or of excusing it, if there had been. But it left it competent for Willock, *at any time afterwards*, to apply to the court to investigate the question of default, and to be relieved from the forfeiture consequent upon it.

From such an application Willock would not be, and was not precluded by the sale ; nor could he be precluded in any manner, short of a judgment in an

Hatch *v.* Fogerty.

action to foreclose his rights and interests under the contract.

Besides the high and peculiarly responsible duty of an attorney towards his client, and the fidelity which he owes to his cause and interests, he is required to be learned and skillful in the practice of his profession. He must have sufficient learning to be able to determine, with reasonable accuracy, upon the appropriate remedies for enforcing or securing the rights of his client, and sufficient skill to conduct the proceedings appropriate to such remedies.

If an attorney fails in any of these respects, he may and sometimes does not only forfeit all claim for compensation, but renders himself liable to his client for any damage which he may thereby sustain.*

But the question of any supposed lack of learning or of skill on the part of the respondent in conducting the proceedings for his client, is not necessarily much involved in the consideration of the questions now before us. Indeed, if this were an action by the respondent against Hogan's representative, to recover his compensation for his services in those proceedings, it is doubtful if we could say that he should not be paid, on the mere ground that such proceedings produced no beneficial result (*Bowman v. Tallman*, 40 *How. Pr.*, 1).

But the decision must be placed upon another and different ground—a ground which involves not the skill or the learning but the fidelity of an attorney to the interests of his client, and which forbids his trafficking in the smallest degree with such interests, by collusion or otherwise, with persons who, in respect to such interests, have occupied an attitude of hostility towards his client.

Some facts stand out prominently in this case. One is, that the respondent employed the attorneys to

* A case in 1 *Tucker's Surr. Rep.*, 247 (A. B.'s estate), goes so far as to hold him liable for ignorance of a recent statute.

Hatch v. Fogerty.

bring the action of Willock against Hogan. Another, that he was interested to the extent of two-thirds in the result of that suit, having acquired such interest directly, by assignment from Willock. Another, that the ground of the prosecution of that action was *the insufficient title Hogan had acquired under the foreclosure proceeding*, which the respondent had himself conducted for Hogan. And another, that he did receive in that suit, and in consequence of it, a portion of the money which had been obtained by a settlement of it, and which settlement was made in consequence of the adverse testimony of the respondent on that trial.

I am aware that the fact has been found by the court, at special term, that the respondent was employed by Hogan, with the concurrence and consent of Willock, to extinguish the claims of certain lien-holders on the premises; and for that purpose, *and not otherwise*, he made the sale of the premises under the power contained in the contract, and procured the release from Willock.

So much of this finding of fact as relates to the purpose of the release is probably sustained by the evidence, but I do not find any evidence sufficient to sustain the remainder of the finding; and a careful examination of the testimony shows, I think, that the respondent's employment by Hogan was to extinguish *all* of Willock's rights and interests *under the contract*, and that whatever motive the latter may have had in concurring in and consenting to the foreclosure proceeding, whether to defeat and thereby defraud his creditors, who had obtained liens upon the premises, or otherwise, it is very evident that *Hogan's intention* and desire was to rescind the contract, and put an end to all claims and rights of Willock under it.

But even if the evidence did establish that the purpose of the foreclosure was to accomplish the defeat of

Hatch *v.* Fogerty.

the lien-creditors, and that Hogan, Willock, and the respondent conspired to effect such purpose by a pretended foreclosure, I am unable to see in it any justification for what has since transpired.

Such purpose need not be stigmatized, and it is enough for the present to say that it furnishes no foundation upon which a defense can be raised. A party who has advised or assisted in perpetrating a wrong cannot afterwards be allowed to use the knowledge he has acquired to secure a pecuniary benefit to himself by an attack upon the proceeding he had advised and conducted to consummate the wrong.

I am also aware of the fact, which has also been found by the court, that Willock was indebted to the respondent in a considerable sum for professional services, and that he took from Willock a transfer of two-thirds of his claim against Hogan in satisfaction of such indebtedness.

But such fact does not, in my judgment, change the aspect of the case, or furnish a reasonable excuse for obtaining payment out of his own client of a debt due from Willock, by a resort to an action whose foundation was a defective and useless proceeding, which such client had employed him to conduct, and which he has failed to make effectual.

The action instituted by the respondent, in the name of Willock against Hogan, if it had no foundation in the errors which the respondent had previously committed, must have been brought for the purpose of harassing Hogan, and vexing him into a settlement. In one or the other of those ways only could the respondent have hoped to succeed. Hogan would be advised that the sale at the Merchants' Exchange was of itself no bar to the action, and the release of Willock the respondent knew, as he afterwards testified, was no barrier.

There was reasonable ground, therefore, for sup-

Hatch *v.* Fogerty.

posing that the action would be successful, or, that operating upon the fears of Hogan, it would produce a compromise and settlement of the claim.

The latter was the result; and it is enough to say that the transaction cannot be countenanced or upheld.

It is fundamental, in respect to the duty of an attorney towards his client, that he shall not use any information that he has derived from his client to the prejudice or injury of his client, and especially that he shall not act in opposition to his client's interests. And the rule is, as laid down in 1 *Ferg. Ir. Prac.*, 37, that lest any temptation should exist to violate professional confidence, or to make any improper use of information which an attorney has acquired confidentially, as well as upon principles of public policy, he will not be permitted *to be concerned on one side of proceedings, in which he was originally in a different interest.*

I regret to say that I am obliged to differ from the conclusions of the learned justice who tried this action at the special term. He was doubtless somewhat influenced, as I have found it difficult to resist being, by the fact that the relation of attorney and client had long before ceased to exist between the respondent and Hogan, as well as the fact that he had for several previous years been acting as the attorney for Willock, and that to obtain payment of a hopeless debt for those services, and for no more improper motive, he became a party to, and instigated, the action which was brought in Willock's name against Hogan.

The law, however, is too regardful of the rights of persons who have fiduciary relations to allow any betrayal of the trust and confidence. Trustees of all kinds are held to a strict accountability, and the interests of *cestui que trusts* are watched with constant care. As was said by the late Vice-Chancellor SANDFORD (in *Poillon v. Martin*, 1 *Sandf. Ch.*, 569, *572), "It is a great principle of equity, that he who bar-

Hatch *v.* Fogerty.

gains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence."

But the duties and obligations of mere trustees, whether enjoined by statute or derived from the principles of equity, do not partake of that peculiar and delicate relation which subsists between an attorney and his client. In his case there is more than a legal claim upon his fidelity. The honor of his profession, and the due administration of justice are involved, and any taint upon his honor will cast its shadow in some degree upon the collective body of his associates at the bar.

Happily, and to the credit of the profession, few reported cases are found which involve a departure from professional faith and duty. But such cases are not needed either to illustrate or enforce so obvious a principle as condemns the transaction in this case.

I will, however, refer to a single case, which is somewhat analogous to the one before us:

Case *v.* Carroll (35 N. Y., 385), was an action to compel an attorney to convey certain premises to the plaintiff, the title to which he had obtained in violation of his duty to his client. And the court says, "The general allegation that he was the defendant's counsel, and undertook to conduct the foreclosure suit for their benefit, is sufficient to create a trust, which a court of equity will enforce against him, by requiring him to convey the legal title to the plaintiff."

The judgment must be reversed, and a new trial had, with costs to the appellant to abide the event.

JONES and SPENCER, JJ., concurred.

Judgment reversed.

Bildersee *v.* Aden.

BILDERSEE against ADEN.

Reversed
72 Abb. N. S. 32.
62 Barb. 170

*Supreme Court, First District; At Circuit, March,
1871.*

UNDERTAKING ON ATTACHMENT.

After an attachment, issued as a provisional remedy under the Code of Procedure, has been set aside, as not authorized by the facts of the case, an undertaking given to procure the discharge of property levied on under the attachment cannot be enforced.

Trial by the court.

This action was brought upon an undertaking given on behalf of a defendant, to release property levied upon under an attachment under section 240 of the Code of Procedure, in an action against one Mrs. Boxsius.

Before judgment, a motion was made, upon affidavits, to vacate the attachment, and an order was made granting the motion. Judgment was subsequently recovered, and, it remaining unpaid, this action was brought on the undertaking. A decision on demurrer to the complaint is reported in 8 Abb. Pr. N. S., 171.

The defendant subsequently amended his answer. The amended answer, after admitting the issue of the attachment, the giving of the undertaking sued on, and the consequent discharge of the attachment, and the recovery of judgment, denied all the other allegations of the complaint; and, for a further defense, the amended answer alleged as follows:

“That said attachment was issued upon the alleged ground, as was falsely and fraudulently made to appear to the justice who granted said attachment, that said defendant Rebecca Boxsius, sued as Mrs. E. Boxsius,

Bildersee *v.* Aden.

was about to remove and dispose of her property with intent to defraud her creditors.

“That at the time of the issuing of said attachment, or at any time prior or subsequent thereto, said Rebecca Boxsius was not removing or disposing, or about removing and disposing of her property with intent to defraud her creditors, and no grounds existed for the issuing of the said attachment, which fact was well known to the plaintiffs when they applied for and procured said attachment by fraud and deceit, in falsely and fraudulently making and presenting false and fraudulent affidavits to said court who granted the same.

“And these defendants further say, that subsequently a motion was made by said defendant Boxsius to vacate and set aside said attachment upon the grounds that no fact existed at the time of the issuing of the said attachment to authorize the issuing of the same, and that she was not about to remove and dispose of her property with intent to defraud her creditors. That said motion was duly argued, and submitted to this court upon proof, who thereon made an order bearing date March 8, 1869, which said order was duly entered, thereby vacating and setting aside said attachment; and a copy of such order is hereto annexed, marked B, and forms a part of this answer, and which still remains in full force and virtue; and thereby said attachment was and remains vacated and set aside on the grounds which are thereby decided, that no facts existed to sustain such attachment.

“That said motion was made and argued, and said order duly made and entered, whereby said attachment was vacated and set aside before the recovery of said judgment against the said Boxsius.

“These defendants, further answering, say, that they were induced to execute the said instrument referred to in the complaint herein by reason of the state-

Bildersee v. Aden.

ments made in the affidavits upon which said warrant of attachment was issued, and also by reason of the representations made by said plaintiffs that grounds upon which said attachment was procured were true, and existed and could be sustained, but all of which was false and untrue, and known to be so by the plaintiff when the same were so made and presented, except the statement in said affidavit that the defendant Boxsius was indebted to them for goods sold and delivered to the amount stated in said affidavit, of which these defendants had no knowledge or information sufficient to form a belief."

The plaintiff moved for judgment on this answer as frivolous; which the court denied on the ground that it could not be so pronounced without argument; and the parties accordingly went to trial.

It appeared on the trial that the attachment had been vacated on the ground that sufficient facts to authorize its issue did not exist at the time it was granted.

A. H. Reavey, for the defendants,—Argued that the vacating of the attachment operated as a total failure of the consideration for the undertaking, and that it was annulled.

A. Blumenstiel, for the plaintiffs,—Argued that the defendants, by the undertaking having unqualifiedly bound themselves to *pay the judgment*, the discharge of the attachment did not release them.

VAN BRUNT, J.—The undertaking sued upon was given to release the debtor's property from the levy of the attachment—in other words, the undertaking stands in the place of the property; the consideration for the undertaking was the fact of the right to levy the attachment upon the property of the defendant named therein.

Carroll *v.* Charter Oak Ins. Co.

The attachment having been set aside upon the ground that it was not properly issued, the consideration for the execution of the undertaking entirely fails; and consequently it cannot be enforced. If the property has been taken under the attachment, it must be returned upon the attachment being vacated.

Judgment must be given for defendants, with costs and allowance.

Judgment accordingly.

CARROLL *against* THE CHARTER OAK INSURANCE COMPANY.*

Court of Appeals; June Term, 1868.

INSURANCE.—WAIVER.—WITNESS.

The receipt by insurers, through their general agent, of renewal premiums, taken by him with knowledge of other insurance on the same property, is a waiver of the requirement of the policy that formal notice of any such insurance must be given, and an indorsement made on the policy.

Notwithstanding a provision in the policy, that no condition can be waived, except in writing signed by the secretary, a condition may be waived by parol, by the general agent acting within the scope of his agency, especially where the act can be regarded as ratified by the company.

The authorities sustain the general doctrine, that a waiver of a stipulation in a contract may be shown by parol, notwithstanding the contract requires a writing.†

* This decision, not previously reported, is now presented, on account of the importance of the questions determined, and with the sanction of the judge by whom the opinion was delivered.

† In *OWEN v. THE FARMERS' JOINT STOCK INSURANCE COMPANY*, (*Supreme Court, Seventh District; General Term, September, 1869*), it was held, 1. that the condition in an insurance policy, requiring timely service of preliminary proofs of loss, cannot be dispensed with by the

Carroll *v.* Charter Oak Ins. Co.

Two witnesses contradicting each other as to whether one of them had given certain notice to the other, it is not error to charge the jury that the one could not have truly sworn he gave the notice, unless he recollects giving it; and that, if he did not recollect it, he had committed perjury.

Appeal from a judgment.

This action was by William Carroll, on an insurance policy, tried at the Monroe circuit, in April, 1863.

court, upon excuse or impossibility shown; but acts of the officers, in examining the facts and assenting to delay on account of the absence of the owner, and in keeping the proofs some days when served after the time has expired, and determining to contest the claim on other grounds, are a waiver of the condition.

2. Upon a policy issued to A., but loss, if any, "payable to B. & Co., and C., as their interest shall appear," the insured may maintain an action in his own name without joining the others; and proof on the trial that the others claim an interest will not defeat the action, if it does not appear that they asserted their claim against the insurers.

3. Where the facts as to the incumbrances were in the knowledge of the insurers' agent who induced the insured to take out a policy, the representation that there were no incumbrances may be regarded as not intended to deny the existence of judgments against the insured, which were a mere general lien on the premises in common with his other real property.

The report in 57 *Barb.*, 518, does not state the facts, but it appears by the case used on the appeal, that at the time of the fire Owen was absent, engaged in running a canal boat, and did not learn of it, until some time after the loss, when he returned home and made out the proofs.

The policy was made out to Blake Owen, but by a subsequent indorsement any loss was made "payable to Walker & Lathrop, and C. C. Walker, as their interests may appear." On the trial Walker was called as a witness and claimed an interest, which, as also that of Walker and Lathrop, he testified consisted in judgments against Owen. The defendants' counsel moved to dismiss the complaint on the ground that Walker and Lathrop had a direct interest in the claim, and should have been made parties plaintiff. The court denied the motion, and to that denial the defendants' counsel excepted.

Carroll *v.* Charter Oak Ins. Co.

On the trial plaintiff proved the issuing of a policy of insurance for one thousand dollars, upon a stock of goods, to Burns & Hughes, by the defendants, November 6, 1858, and by them assigned to Burns & Vance, with defendants' consent, on November 29, 1858; also, a renewal receipt, dated November 6, 1859, signed by the president and secretary of the company.

It was also shown that four other policies, of one thousand dollars each, were subsequently issued to Burns & Vance by other companies.

Only one thousand dollars of other insurance was mentioned in the policy.

There was a provision in the policy that, in case of other insurance, not notified to defendant and indorsed upon the policy, the policy should be void. The policy also contained this provision: "This company will not be bound by an instrument, record or statement not referred to or contained in this policy; and no condition of the policy can be waived, except in writing, signed by the secretary."

One Sheldon was the general agent of the company, and also of other companies, and he issued one of the subsequent policies.

The premium on the renewal was paid to Sheldon, November 10, 1858.

Upon the trial, Peter Burns testified that he notified Sheldon, the agent, of the other insurance, at the time of paying the premium on a renewal of the policy in suit, and that Sheldon said it was all right. Sheldon was subsequently examined as a witness, and testified that he was not so notified.

It was also proved on the trial that the renewal premium was never returned; that the insured property was destroyed by fire December 10, 1859; and there was evidence that it was of the value of six thousand dollars and upwards, which was disputed. After-

Carroll *v.* Charter Oak Ins. Co.

wards, on December 21, the policy was assigned to the plaintiff.

The defendant moved for a nonsuit, and the motion was denied.

Sheldon, the agent, was sworn for the defendant, and testified that he was furnished with blanks signed by the officers of the corporation, which he filled up at his discretion, and made returns to the company of all his transactions, paying over all moneys the first of every month. He denied that he was notified of the other insurance.

In his instructions to the jury, the judge directed them, that if they believed that notice of the other policy was given to Sheldon, either at the time of renewing the policy in suit, or at the time of payment of the renewal premium, the plaintiff was entitled to recover; and he also told the jury that Burns could not truly swear to the notice unless he recollects it, because it was an affirmative fact, and unless he recollects it, he had committed perjury in swearing to it.

To these instructions the counsel for the defendants excepted.

Other exceptions taken to the charge of the court, and the refusals to charge, sufficiently appear in the opinion.

The jury found a verdict for the plaintiff, and the defendant appealed to the general term, where the judgment was affirmed. The decision is reported in 40 *Barb.*, 292. A previous decision is in 38 *Id.*, 402. The defendant now appealed to this court.

W. F. Cogswell, for the appellant.

J. C. Cochrane, for the respondent.

BY THE COURT.—MILLER, J.—Upon the trial of this action at the circuit, the plaintiff, for the purpose of ob-

Carroll *v.* Charter Oak Ins. Co.

viating the objection made to his right to recover on account of the existence of other insurance not mentioned in or indorsed upon the policy, introduced testimony to show that when the agent of the defendant received the permission for the renewal of the policy issued to the plaintiff, he was notified of the existence of other policies of insurance upon the property. The evidence was objected to, and received ; and its introduction involves the question whether the defendant, by means of its agent, and by giving a renewal receipt for the money, waived the condition in the policy requiring an indorsement of any new insurance upon it, and the provision therein that no condition could be waived, except in writing, signed by the secretary of the company.

There was evidence upon the trial to show that the agent was notified, and had full knowledge of the existence of the other policies. He had an undoubted right to receive the money and renew the policy ; and if the defendant accepted the money with full knowledge of all the facts, which I think must be assumed, then the forfeiture was waived which the omission to comply with the provision contained in the policy had occasioned.

It is too well settled to admit of serious question, that a party may waive the benefit of any condition or provision made for his benefit. This relates to contracts, to statutes, and even to a constitutional provision. It has been held by repeated adjudications in this State, that forfeitures of all kinds may be waived, and there are numerous authorities which uphold this doctrine. It may be well to refer to some of the cases which bear particularly upon the question before us. In *Viall v. Genesee Mutual Ins. Co.* (19 *Barb.*, 440), it was decided that where an insurance company, after the policy has become forfeited by a violation of one of the conditions thereof, make an assessment upon

Carroll *v.* Charter Oak Ins. Co.

the premium note of the assured, and collect and receive the amount, with full knowledge of such forfeiture, that it amounts to an admission that the contract of insurance is still in existence. *Frost v. Saratoga Mut. Ins. Co.* (5 *Den.*, 154), holds, that when the application stated untruly that there were no buildings within ten rods of the buildings insured, and the insurers, with full knowledge of the inaccuracy of the statement, afterwards made assessments upon the premium note, that they were estopped from setting up these facts, and were liable for the loss.

In *First Baptist Church v. Brooklyn Fire Ins. Co.* (19 *N. Y.*, 305), this court decided that a provision, in a policy executed, that no insurance, whether original or continued, should be binding until the actual payment of the premium, and the written acknowledgment thereof, does not invalidate a subsequent contract by parol, to renew such insurance, for a premium not paid at the time when the risk attached, but postponed to a future day. It was said by the learned judge who delivered the opinion, that on any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive payment in cash of the premium, substituting therefor a promise to pay on demand at a future day, and that proof of such agreement would not have a tendency to contradict or change the written policy. The principle here laid down would appear to cover the question involved in the case at bar, for if the company can thus waive by parol the very condition which provides for the payment of the consideration money upon which the contract depends, then for the same reason they can waive a condition which is of no greater importance, and which relates to the authority to make other insurances, which is usually conferred, almost as a matter of course (see *Goit v. National Protection Ins. Co.*, 25 *Barb.*, 189, where the same principle is applied).

Carroll *v.* Charter Oak Ins. Co.

In *Pierrepont v. Barnard* (6 N. Y. [2 *Seld.*], 279), it was held, that a stipulation in a contract which provided that no timber be cut without a consent in writing, might be waived by parol. The doctrine of waiver has also been frequently applied where leases have been forfeited by a violation of a condition, and the payment of rent, or any other act which recognized the existence of the lease, by the lessee after forfeiture, has been held to be a waiver (*Jackson v. Allen*, 3 *Cow.*, 220; *Clark v. Jones*, 1 *Den.*, 516).

The admission of parol evidence to show the waiver, is clearly within the principle laid down in the cases cited, and it may be established by evidence of an express waiver, or by circumstances from which it may be inferred. So, also, it may be done by the act of the company, or its general agent, who has authority to enter into contracts on its behalf, and, so long as they are confined to matters of the agency, to bind his principals (25 *Barb.*, 192). Nor is such evidence in conflict with any of the decisions to which our attention has been directed, which are supposed and claimed to uphold the position that such testimony is inadmissible (*Gilbert v. Phoenix Ins. Co.* (36 *Barb.*, 372), which holds that the provision requiring notice to be given to the company, and mentioned or indorsed on the policy, is valid, and that a breach renders the policy void, does not present the question of waiver which now arises. *Lamatt v. Hudson River Fire Ins. Co.* (17 N. Y., 199), merely decides that evidence of an agreement cotemporaneous with the policy, varying its provisions, is inadmissible;—a doctrine which cannot be disputed. Neither of them are in conflict with the cases to which I have particularly referred. Some cases are cited outside of this State, but as the law is well settled here, it is not necessary to examine them.

It is said that the evidence was inadmissible by reason of the clause that no condition of the policy could

Carroll *v.* Charter Oak Ins. Co.

be waived except in writing, signed by the secretary. It was competent, I think, to modify this provision by a valid parol agreement duly executed. In *Sheldon v. Atlantic Fire & Marine Ins. Co.* (26 N. Y., 460), it was expressly decided that a general agent may waive the condition of a policy as to the prepayment of the premium. This would seem to be within the general scope of the authority of the insurance agent; but if there is any question as to the power of the agent in this respect, I think it is obviated by the act of the company in the present case. They received the money of the agent, executed a proper receipt therefor, and did not return or offer to return the money, thereby ratifying and confirming the act of their agent. The agreement was executed, and had the effect to renew the policy. There was nothing in the policy prohibiting the agent from making a contract, and notice of the issuing of other policies could be given by the insured, I think, at the place where the agent and the insured resided, to the agent himself, who alone represented the company there. Notice to him was notice to the defendant; and it was not necessary that the notice should be in writing.

If he had authority to receive the money, as he clearly had, then payment to him was a payment to the defendant. He was fully empowered to act for the company, to use their receipts, and to make a renewal by the delivery of a receipt signed by the officers of the company. The defendants, by an instrument executed by the proper officers, acknowledged in writing the receipt of the money. They did this with notice of the existence of other insurances. It is presumed that they had the same knowledge which the agent had, and thus they waived the condition by executing a new contract, and are estopped from urging that the condition was not complied with which they have thus waived.

It is said that the estoppel is based upon the acts

Carroll *v.* Charter Oak Ins. Co.

and declarations of the agent, whose acts and declarations it is agreed shall not affect the party against whom the estoppel is claimed (See 20 *N. Y.*, 32). This is not strictly in accordance with the facts, as the acts of the agent have been ratified by the company, and made their own act, and the estoppel is based as much upon the ratification as on the original act itself, which together, if the agent had authority, constitute one transaction.

I think that the learned judge committed no error upon the trial in charging that if notice of other policies of insurance was given to the agent, either at the time of the taking of the renewal receipt, or the payment of the renewal premium, that the plaintiff was entitled to recover, and in refusing to charge that if they should find that the notice, if any, was given after the renewal receipt was issued, although before the payment of the premium, still the policy was void. It was enough, in my opinion, if notice was given to the agent while acting in the transaction of business for his principal, and notice to him was notice to the defendant (Bank of United States *v.* Lewis, 2 *Hill*, 461; Ingalls *v.* Morgan, 10 *N. Y.* [6 *Seld.*], 184, 185; *Angell & Ames on Corp.*, § 305). The agent acted for the defendant in effecting the insurance, and in all matters connected with it, and had ample authority for those purposes; and if he received the money with the notice, it was quite as effective as if it had been paid previously, when the receipt was given. The transaction of receiving the money and giving the receipt must, I think, be considered as one entire thing, so connected together that it cannot well be separated. If the company chose to vest their agent with such general powers as to give a receipt before payment, and then accepted this money and notice, it has no ground for complaint because it executed an instrument which binds the corporation for the whole transaction. There

Carroll *v.* Charter Oak Ins. Co.

is no doubt that the defendant received the money after it was paid, in accordance with the receipt, and it is, I think, a fair legal inference that it was received subject to all the conditions and surrounded by all the circumstances which characterized the transaction.

The remarks as to the last point discussed, apply with equal force to the judge's refusal to charge that, although notice was given by Burns & Vance at some other time than the application for a renewal of the policy, still the policy was void.

It is also insisted by the defendants, that the judge erred in charging the jury that Burns could not truly swear to the notice unless he recollects it, because it was an affirmative fact, and that unless he recollects it, he had committed perjury in swearing to it. I discover no ground of objection to this portion of the charge. Clearly, it was an affirmative fact in giving notice—an act done by the party, which he swore to positively; and he could not shield himself from a charge of perjury, established by satisfactory evidence, by claiming a want of memory. His positive affirmation that he gave notice would not be in accordance with the truth, if he simply did not recollect. And if he swore without recollection, then it was legal false swearing.

Some other points were made upon the trial, but they are not now presented for our consideration, and require no comment.

The judgment must be affirmed.

GROVER, J., also delivered an opinion for affirming the judgment.

HUNT, Ch. J., and DWIGHT and CLERKE, JJ., concurred in affirmance.

MASON, J., delivered an opinion for reversal, and BACON and WOODRUFF, JJ., were also for reversal.

Judgment affirmed.

Kolgers v. Guardian Life Ins. Co.

*Answered
1/ny. 6/38.*

KOLGERS *against* THE GUARDIAN LIFE INSURANCE COMPANY.

*Supreme Court, Second Department, Second District;
General Term, March, 1871.*

INSURANCE.—EVIDENCE OF WAIVER OF FORFEITURE.
—POWER OF AGENT.—QUESTIONS OF LAW AND FACT.

The rules of an insurance company, and the terms of a policy issued by it, may be waived by the ordinary custom of its office in dealing with its patrons.*

Where the plaintiff's evidence, in an action on a life policy, which was defended on the ground of alleged forfeiture by non-payment of premium, showed that the premium was, in fact, paid, after default, to a person employed by the company, and who was commonly sent to collect premiums and was accustomed to sign receipts therefor;—*Held*, that the question whether he was authorized by the company to waive the forfeiture should have been submitted to the jury.

To direct a verdict for defendants in such a case is error.

Appeal from a judgment, and from an order denying a motion, which had been made on the judge's minutes, for a new trial.

This action was upon a policy of life insurance upon the lives of the plaintiff and her husband, and upon the death of either payable to the survivor. The husband died, and the plaintiff sued upon the policy.

The defendants answered that the policy had lapsed and become void, by reason of the failure of the plaintiff or her husband to pay the premiums when they

* Compare *Carroll v. Charter Oak Ins. Co.*, *Ante*, 166.

Kolgers *v.* Guardian Life Ins. Co.

became due. The premiums were, in fact, paid by the plaintiff, after the time for payment had expired, to a person employed by the company; but the defendants claimed that this person was not authorized to receive them, and by receiving them to waive the forfeiture.

The cause was twice tried; upon the first trial, the court directed judgment for the plaintiff. This judgment was reversed at the general term, upon the ground that as the case then stood the plaintiff was not entitled to recover, and that, in any aspect, it was error to order a verdict for the plaintiff upon a state of facts which at best should have been submitted to the jury for their finding, and also because of the erroneous exclusion of evidence offered by the defendant, viz: the charter and by-laws of defendant's company. That decision is reported in 9 Abb. Pr. N. S., 91.

There was then another trial, upon which the court directed a verdict for the defendants, and the plaintiff appealed.

The nature of the evidence on the second trial appears from the opinion of the court.

After the testimony was closed, counsel for defendant asked the court to direct a verdict for the defendant, upon the following grounds:

1. That by the policy of insurance it expired by its terms on April 25, 1869, and also on July 25, same year, when the premium became due and not paid.
2. That also by its terms, the policy could only be renewed or revived by an officer of the company.
3. That there was no evidence in the case that it had ever been renewed or revived.
4. That there was no evidence that the premium due April 25, 1869, or on July 25, same year, had been paid to the company.
5. That the receipt of the money, under the circum-

Kolgers v. Guardian Life Ins. Co.

stances under which it was paid, was not a revival of the policy nor a payment of the premium, according to its terms, nor a waiver of the forfeiture by the default theretofore made.

[Plaintiff's counsel objected. The objection was overruled and exception taken.]

Counsel for plaintiff then asked leave to go to the jury on all the questions of agency, whether the company, in the position in which Mr. Holley was put by them, was not bound by his acts, and whether the notice given them a month before the death of Mr. Kolgers to the cashier did not require of them to give some notice to repudiate the act of which they were bound to take notice, and whether all plaintiff did was not properly done, and whether they were not bound to impose upon some of their officers, or some of their agents, the duty of repudiating the payment which was brought to their own knowledge.

The court declined the request of plaintiff's counsel, to which ruling plaintiff excepted.

The Court.—I do not think there is any question of fact in this case ; it is purely a question of law ; it is one of those cases which appear to be pretty hard, but the law is perfectly well settled in this State that the clerks of a corporation are special, and not general agents.

The court directed that plaintiff's complaint be dismissed, and directed a verdict for defendant. Plaintiff's counsel duly excepted, and afterwards moved for a new trial, upon the judge's minutes, which motion was denied.

S. D. Morris and Thomas E. Pearsall, for the plaintiff, appellant.—I. According to the usual course of business, as shown by the evidence, Holley was an agent, authorized to collect premiums on lapsed policies, and give receipts therefor.

Kolgers *v.* Guardian Life Ins. Co.

II. The court erred in excluding the offer of plaintiff's counsel, to prove the custom of the defendants in receiving premiums on policies after the time for payment had expired (Commercial Bank *v.* Kortright, 22 *Wend.*, 348).

III. The court erred in directing a verdict for defendants. The question whether Holley had authority to receive the premium or not, or whether his acts had been ratified or not by the defendants should have been submitted to the jury (Conover *v.* Mutual Ins. Co., 3 *Den.*, 254; Lycoming County Mutual Ins. Co. *v.* Scholtenberger, 44 *Penn. St.*, 259).

IV. Defendants having allowed Holley repeatedly to collect premiums past due, and give receipts therefor, they are estopped from denying his authority in this particular case. Authority in such a case will be presumed (Goit *v.* National Ins. Co., 25 *Barb.*, 187; Baker *v.* Union Life Ins. Co., 6 *Abb. Pr. N. S.*, 144; Bank of Vergennes *v.* Warren, 7 *Hill*, 91).

V. Notice of the receipt of the premium and an account of the same rendered to the agent authorized to waive forfeiture, was notice to the company, and waiver of the forfeiture by it (Buckbee *v.* United States Co., 18 *Barb.*, 541; Mechanics' Bank *v.* Schamberg, 38 *Mo.*, 228; Trenton Banking Co. *v.* Woodruff, 1 *Green Ch.*, 117; Branch Bank at Huntsville *v.* Steel, 10 *Ala. N. S.*, 915; 3 *N. Y. [3 Comst.]*, 156).

VI. Unless an unauthorized act of an agent is repudiated within a reasonable time after knowledge, the principal will be bound by it, and there was no such repudiation in this case (Cairnes *v.* Bleecker, 12 *Johns.*, 300; Hope *v.* Lawrence, 50 *Barb.*, 258).

VII. So far as the agent, whether general or special, is in any case held out to the public at large, or to third persons dealing with him, as competent to contract for or to bind the principal, the latter will be bound by the acts of the agent, notwithstanding he may have

Kolgers *v.* Guardian Life Ins. Co.

deviated from his special instructions or orders (see *Story on Agency*, §§ 127, 133).

VIII. The facts in this case differ materially from the facts in the former case, and fully meet the objections stated in the opinion of the court in that case. This will clearly appear by reading the opinion in that case in connection with the facts in this.

Mr. Reynolds, and Miller, Peet & Opdyke, for defendants, respondents.

BY THE COURT.*—J. F. BARNARD, P. J. (after stating the facts). From a careful examination of the case, I am of the opinion that the judgment should be reversed, and a new trial ordered.

The proof is somewhat fuller than upon the first trial. The plaintiff, who was one of the insured, and had a direct interest in the life of the policy, paid her money due for the back premiums to a person (Holley) who was in the employ of the defendant, and whom she found at a desk behind the railing or counter, at their place of business. She paid, after inquiry as to the past payments, and after Holley had examined the defendant's books and given her the information which she sought. She asked if she could pay the back premiums, and was answered by the said person, "Certainly you can." The secretary was an officer of the company, and as such had the power to receive over-due premiums, and waive forfeitures. The by-laws of the company, admitted on this trial, and excluded on the first, established this power of the secretary. Castle, the cashier, received premiums on expired policies, and had direct authority to sign for the secretary, and by the evidence of the then secretary of the defendants it appears that various persons in the cashier's ab-

* Present, J. F. BARNARD, P. J., and TAPPAN, J. GILBERT, J., took no part.

Kolgers *v.* Guardian Life Ins. Co.

sence, Holley among the number, occupied the cashier's desk and acted for him. The secretary also testifies that when he found policies behindhand, Holley was sent to collect them. "What he would take I cannot say.* I did not sign one in a thousand of the receipts ; he might sign them, or somebody else might sign them." "Many of the clerks used to sign for me, without any authority that I know of." The same witness testifies, "that the only way of waiving a forfeiture was by receiving the premium and giving a receipt ;" and also that the general practice of the company was to waive forfeiture by receiving the premiums when there was nothing in the case to raise suspicion or inquiry.

I do not advert to the testimony adduced by the defendants, for the reason that the court below, in directing a verdict, has, in legal effect, said to the plaintiff, you cannot recover, even if the jury should find as facts all that you claim as the fair meaning of, and inference from, the evidence which you give.

From this view of the case I dissent. Whatever the terms of the policy, whatever the rules and regulations of the company, made in its interest and for its protection, the defendants had power to waive them, not only by express formal waiver, but also by its ordinary custom and mode of dealing with its patrons. No corporation should be permitted to annul the effect of the customary method of its dealings and business by invoking the force of laws and regulations which it has practically disregarded ; and if, in this case, it has compromised the effect of its rules by their frequent and habitual suspension, and if it has allowed those to act, or to seem to act, as officers, who were not officers, its formal regulation against such a course of dealing can avail nothing. Its liability, so far as this action is con-

* This was in answer to the question whether Holley took with him receipts, and by whom such receipts were signed.

Albany & Susquehanna R. R. Co. *v.* Dayton.

cerned, is to be determined by its own conduct. If Holley, under all the proof, has been permitted by the company to occupy a position and discharge duties which authorize the insured to treat with him as with an officer empowered to remit forfeiture and renew policies, then the plaintiff should recover. How the jury should have found it is not for me to say; but it should have been submitted to them upon the whole case to determine whether the defendants, by the conduct of their business and the character of the different duties performed by Holley, had or had not authorized the plaintiff to rely upon the transaction with Holley, in the matter of the over-due premium, as a transaction with the company itself.

The judgment should be reversed, and a new trial granted, costs to abide event.

Order accordingly.

ALBANY AND SUSQUEHANNA RAILROAD COMPANY *against* DAYTON.*

Supreme Court, Sixth District; General Term, January, 1865.

APPEAL IN RAILROAD CASES.—COMPENSATION FOR LANDS.—MEASURE OF DAMAGES.

An appeal lies to the general term, from an order of the special term setting aside a report of commissioners awarding damages for lands taken for a railroad.

* This case, which, although decided some time since, has not been before reported, is now presented, with the sanction of the judge who delivered the opinion of the court.

Albany & Susquehanna R. R. Co. v. Dayton.

The compensation to be awarded to an owner, part of whose lands are taken by a railroad company, should include a just compensation, 1. For the value of the part taken, and, 2. For the effect which the taking will have in depreciating the market value of what is left.

An award which includes both these elements should not be set aside because the commissioners did not allow for "the inconveniences" to the residue in respect to the owner's use.*

The rule laid down in *Canandaigua & Niagara Falls R. R. Co. v. Payne* (16 *Barb.*, 273),—approved.

Where the commissioners allowed five hundred dollars for the taking of a strip of land worth sixty dollars from the defendant's mill site;—*Held*, that although the opinions of witnesses stated the depreciation of the mill property at from one thousand to twelve hundred dollars, the award should not be set aside.

Appeal from an order.

The supreme court, at special term, set aside an award of commissioners for lands of Gideon M. Dayton, taken by the Albany and Susquehanna Railroad Company, and ordered a rehearing, upon grounds stated in the opinion of the court. From the order of the special term the railroad company appealed.

BY THE COURT.†—MASON, J.—It is claimed by the respondent's counsel, upon the authority of the case

* A somewhat different view of this question was taken in the case of the Utica, &c. R. R. Co. (56 *Barb.*, 456), where it was held that in determining the compensation to be paid to land owners whose property is taken under the general railroad act as amended, the owner is entitled to an allowance, not only for the actual value of the piece taken, and for the depreciation of the residue of the lot from which it is taken, by such separation, but also for any depreciation caused by the use to which the piece taken is to be appropriated. The true question is—What will the place, as a whole, bring in the market after the railroad is constructed? and everything which will depreciate the value of that residue, such as exposure to fire, difficulty of access, annoyance of noise, smoke, danger of use, &c., ought to be taken into account. [Following 13 *Barb.*, 169; 17 *Wend.*, 670; 18 *Barb.*, 80. 2 *Metc.*, 147; 3 *Cush.*, 107; and, disapproving 16 *Barb.*, 68.]

† Present, MASON, BALCOM and PARKER, JJ.

Albany & Susquehanna R. R. Co. v. Dayton.

of New York Central R. R. Co. *v.* Marvin, 11 *N. Y.* [1 *Kern.*], 276, that no appeal will lie to the general term from the order of the special term, in a case like the present. It is proper to remark that that case was decided under the general railroad act of 1850, and involved the right of appeal to the court of appeals alone (*Laws of 1850*, ch. 140). The act of April, 15, 1854, entitled "An act in relation to special proceedings" (*Laws of 1854*, ch. 270, § 1), provides that "an appeal may be taken to the general term of the supreme court, &c., from any judgment, order, or final determination made at a special term of said court, in any special proceedings therein;" and the next section of the act applies sections 327, 328, 330, and 332 to all appeals in such special proceedings.

This is an appeal from an order made at special term, in special proceedings (11 *N. Y.* [1 *Kern.*], 276, 277), and is fully authorized by the act of 1854.

I have looked very carefully through this case, and have not been able to discover that any rule of law was violated by the commissioners upon the hearing of this case.

They certainly held to rules of evidence extremely liberal in the defendant's favor, in the admission of evidence, and excluded nothing that could be admitted upon any principle.

Judge CAMPBELL ordered a rehearing on the appeal before him, upon the ground, as stated in the order, "that the commissioners before whom the award and report were made, did not, in fixing and determining the amount that ought justly to be paid to the said Gideon M. Dayton, for the real estate proposed to be taken by said company, consider and allow for the inconveniences to the said mill of the said Gideon M. Dayton, occasioned by the taking of the real estate by the said company for their said railroad," &c.

The learned judge, in my judgment, committed an

Albany & Susquehanna R. R. Co. v. Dayton.

error in interfering with the assessment of the commissioners.

The land actually was not worth more than sixty dollars ; and the commissioners allowed the defendants five hundred dollars damages.

The commissioners, therefore, not only allowed the defendant for the value of the land taken, but over four hundred dollars for the depreciation of the land not taken.

The commissioners were required to view the premises and hear the proofs and allegations of the parties, and to make up their award both from their own examination of the premises and the proofs, and this they have done ; and as they have not violated any rule of law, I do not think this court can be justified in saying that they erred upon this question of fact. The commissioners were not bound in law to follow the opinions of the witnesses, who stated the depreciation of this property for mill purposes to be from one thousand to twelve hundred dollars,—in consequence of constructing this railroad through these lands, or of taking this strip of ninety feet for a railroad.

They saw the premises, and heard all the evidence, and were to award the defendant, *first*, what they considered would be a just compensation to be made to the defendant in the premises, giving to him the fair value of the land, and *second*, a just compensation for the effect which the *taking* would have in depreciating the market value of what is left.

We cannot say that the commissioners have not done this in the present case. The rule laid down by the judge at special term will hardly do, I think.

The commissioners should not “*consider and allow for the inconveniences to the land and mill*” as such. The rule laid down by the court in the case of the Canandaigua & Niagara Falls R. R. Co. v. Payne (16 *Barb.*, 273), is sound, and should be adhered to.

Gray *v.* City of Brooklyn.

The last paragraph in the head note to that case contains the true rule, and is approved. The order of the special term is rescinded, and the assessment and award of the commissioners should be confirmed with ten dollars costs to appellants.

PARKER and BALCOM, JJ., concurred.

Order rescinded and award confirmed.

GRAY *against* THE CITY OF BROOKLYN.

Court of Appeals; September, 1869.

CONSTITUTIONAL LAW.—LIABILITY OF MUNICIPAL CORPORATIONS.—IMPLIED CONTRACT.

Under the charter of Brooklyn, as amended in 1862, an action will not lie against the city for nonfeasance or misfeasance on the part of the public officers.

The act (*Laws of 1862*, p. 203, § 39) amending the charter of the city of Brooklyn (*Laws of 1854*, p. 860, ch. 384), by exempting the city from liability for nonfeasance, &c., of city officers, is not unconstitutional as impairing the obligation of contracts, or as conflicting with section 3 of article VIII. of the Constitution of the State of New York, which provides that all corporations may sue and be sued, as natural persons.

That section of the Constitution was intended to confer on corporations the capacity to be sued, not to define the cases in which suits may be maintained against them.

The words "this act," in section 39 of the amendatory act (*Laws of 1862*, p. 203), must be construed as referring to the charter of 1854, as amended, and not merely to the amendatory act.

That section was intended, not to divest persons affected thereby of their rights, but to change and limit their remedies.

Gray *v.* City of Brooklyn.

The implied contract which is deemed to arise out of the acceptance of a charter by a municipal corporation, is a contract between the city and the State, and not between the city and individuals; and is not "impaired" by a statute exempting from liability for torts.

Appeal from a judgment.

This action was brought by Daniel H. Gray, to recover damages for alleged negligence on the part of the defendants in constructing a sewer, whereby his premises were flooded. The injury was sustained after the passage of the act of 1862.

The defense interposed was the amendment to the charter of the city of Brooklyn, quoted and discussed in the opinion.

The complaint was dismissed after the plaintiff's evidence was put in; and the plaintiff appealed to the general term, where the judgment was affirmed. At the general term, J. F. BARNARD, J., delivering the opinion, it was held that the act was constitutional, and a good defense (see 50 *Barb.*, 365).

The plaintiff appealed to this court.

Bernhard Hughes, for plaintiff, appellant.—I. It is the duty of municipal corporations to preserve and keep in repair, works which they have constructed (*Mills v. City of Brooklyn*, 32 *N. Y.*, 489, 499; *Conrad v. Village of Ithaca*, 16 *N. Y.*, 158, 169; *Rochester White Lead Co. v. City of Rochester*, 3 *N. Y.* [3 *Comst.*], 463, 468; *Storrs v. City of Ithaca*, 17 *N. Y.*, 104; *Hutson v. Mayor, &c. of N. Y.*, 9 *N. Y.* [5 *Seld.*], 163; *Mayor, &c. of N. Y. v. Furze*, 3 *Hill*, 612, 615, &c.).

II. The law of 1862 (p. 203), does not exempt defendant from its corporate liability. 1. It is unconstitutional, because it applies to the city of Brooklyn only, and takes away a vested right. 2. It is not within the power of the legislature to exempt a municipal corporation from its legal liability, any more than it would

Gray *v.* City of Brooklyn.

be to exempt an individual. 3. It is not within the scope of the legitimate authority of the legislature to shield one city from its legal liability for wrongs done in its corporate capacity, and to hold all other municipal corporations responsible for negligence.

III. The law of 1862 does not exempt defendant from its liability. Titles 4 and 5 refer to the act of 1862, and to no other act whatever (§ 39). Plaintiff's claim was not only a common law but a constitutional right. The act of 1862 has not taken away that right, as it nowhere exempts the city of Brooklyn from its liability to keep its streets in repair. Statutes are to be construed in reference to principles of the common law (1 *Kent Com.*, 510, 514). Where rights are infringed, fundamental principles overthrown, and when the system of the laws is departed from, the intention of the legislature must be expressed with irresistible clearness (People *ex rel.* Cunningham *v.* Roper, 35 *N. Y.*, 629, 635; 2 *Cranch*, 290).

IV. The act of 1862 is an act to amend an act to consolidate the cities of Brooklyn and Williamsburgh, passed April 17, 1854. The act of 1854 imposes the duty of keeping streets in repair. This duty has not been repealed by the act of 1862, and the liability stands now as it did before the passage of the latter act.

V. If the act of 1862 applies to the act of 1854, so as to exempt the city from such liability, the legislature can legalize fraud, trespass, larceny, and all other assaults upon life and property.

VI. The act of 1862, pp. 199, 201, 203, introduces a gross confusion of authority, and gives no remedy, while it does a positive injury and takes away a vested right.

VII. If the act has any application to this case, it is unconstitutional. The defendant, by accepting its charter, entered into an implied contract with the plaintiff to keep the streets in repair and indemnify him against its acts of negligence. When a corporation accepts a

Gray *v.* City of Brooklyn.

grant it is bound to perform its conditions (Conrad *v.* Village of Ithaca, 16 *N. Y.*, 163, and cases there cited). Plaintiff's rights vested under and by virtue of this implied contract, as well as the grant of the legislature to the defendant. The legislature can no more revoke its grants than a donor his gifts when delivered (*Sedgw. on Constitutional Law*, 625, and cases there cited; People *v.* Platt, 17 *Johns.*, 195, 213, 214; 4 *Wheat.*, 514; 6 *Cranch*, 144, 145). Such contracts are protected by the Constitution of the United States (*U. S. Const.*, I., § 10, subd. 11; Conrad *v.* Village of Ithaca, 16 *N. Y.*, 163). The constitutional provision is designed to protect certain fixed private rights, whether express or implied (People *ex rel.* Cunningham *v.* Roper, 35 *N. Y.*, 629, 639).

VIII. The act of 1862 violates the Constitution of the State of New York (Art. VIII., § 3). There is no power reserved in the Constitution enabling the legislature to exempt corporations from liability more than natural persons. All duties imposed upon a corporation raise an implied promise of performance.

IX. No security to be furnished by individual officers of the corporation is provided by the act, and the responsibility is shifted from the principal to the agent, and no remedy is provided against the agent. Where the remedy fails, the right revives.

X. Municipal corporations are to be held to the same responsibility as natural persons, and stand, in respect to grants made to them by the State, on the same footing as would an individual upon whom like special franchise had been conferred (Bailey *v.* Mayor, &c. of N. Y., 3 *Hill*, 531; N. Y. & New Haven R. R. Co. *v.* Schuyler, 34 *N. Y.*, 30; People *ex rel.* McConvill *v.* Hills, 35 *N. Y.*, 449, 452).

XI. Remedies to enforce contracts are within the power of the legislature—the contracts themselves are not. The legislature cannot, by acting on the remedy,

Gray *v.* City of Brooklyn.

impair the obligation of the contract (*Morse v. Goold*, 11 *N. Y.*, [1 *Kern.*], 281; *Bronson v. Kinzie*, 1 *How. U. S.*, 311). So long as a municipal corporation retains its corporate powers, the legislature cannot exempt it from liability (*Chenango Bridge Co. v. Binghamton Bridge Co.*, 26 *How. Pr.*, 126, 137).

Jesse Johnson, for the defendant, respondent.—I. Section 39 is a part of the existing charter of the defendant, and applies to the liability sought to be imposed. The intention of the legislature in this re-forming of the city charter, clearly was to relieve the city from liability for neglect of duty by public officers elected under its provisions, or of their appointees. That the provision in question relates to the whole charter, and not merely to the amendatory act, is evident by reference to “Titles 4 and 5,” *there being no such divisions in the amendatory act*. Separate the provision from that to which it relates, and it has no meaning, while, considered in reference to the city charter, it is of great importance. The provision should be treated simply as an *addendum* to the original act, being part of an act “amendatory” thereof. All statutes in *pari materia* are to be taken together as if they were one law (*Rogers v. Bradshaw*, 20 *Johns.*, 735; *McCartee v. Orphan Society*, 9 *Cow.*, 437; *Rexford v. Knight*, 15 *Barb.*, 627; *People v. Aichison*, 7 *How. Pr.*, 241; *Turnpike Co. v. People*, 9 *Barb.*, 161; *Smith's Com. on Stat. Law*, 751, §§ 736, 739; 1 *Dougl.*, 30; 1 *Kent Com.*, 463, 464). The intention of the law-giver is to be deduced from a view of the whole statute, and the real intention will always prevail over the literal (1 *Kent Com.*, 162; *People v. Draper*, 15 *N. Y.*, 532; 15 *Barb.*, 156). The design and object of the legislature are to be considered (*Beebee v. Griffing*, 14 *N. Y.* [4 *Kern.*], 235; *Donaldson v. Wood*, 22 *Wend.*, 395; *Turnpike Co. v. McKean*, 6 *Hill*, 616; 10 *Co.*, 57; 1 *Pick.*, 105; 3 *Bing.*,

Gray *v.* City of Brooklyn.

193; 2 *Roll.*, 137; *Hob.*, 93; *Dwar.*, 690, 696; *Plowd.*, 205; 1 *Show.*, 491; *Bac. Abr.*, tit. Statutes, I., 5; Sir WILLIAM JONES, 105. And see opinion in court below, 50 *Barb.*, 365).

II. No obligation of contract is impaired by this statute. 1. Plaintiff gave no consideration for the duty he seeks to impose. 2. Defendant exists as a legal body only by virtue of this charter. The receipt of it is the *only consideration* that raises the duty sought to be imposed, and the charter, including this section, was received before this action accrued.

III. The sovereign power is never liable for nonfeasance or misfeasance in the performance of any governmental function. It is only when a special privilege or charter has been given to a community, that a duty is raised in consideration thereof, the breach of which becomes actionable (Conrad *v.* Village of Ithaca, 16 N. Y., 158, 163, 164; Welt *v.* Village of Brockport, and cases there cited, referred to in note to above decision; Lorillard *v.* Town of Monroe, 11 N. Y. [1 *Kern.*], 392; People *ex rel.* Mygatt *v.* Supervisors of Chenango, *Id.*, 563, 573; Morey *v.* Town of Newfane, 8 *Barb.*, 645, 649, &c.) The receipt of a charter is a consideration for no obligation which, by its express terms, is excluded.

IV. It cannot be claimed that the contract was fixed before the amendment in question. 1. The power of the legislature is unlimited over all subjects of legislation, except where restrained by the constitution. Any contract inuring to the benefit of plaintiff was subject to a reserved power of amendment, contained in the charter, and to a similar power in the constitution itself (*Constitution*, art. VIII., § 1; Darlington *v.* Mayor, &c., of N. Y., 31 N. Y., 164, 181, 182, quoting and approving Dartmouth College Case). 2. The liability in question is a common law liability, however derived, and the whole body of the common law is expressly made subject

Gray *v.* City of Brooklyn.

to alteration by the legislature (*Constitution*, art. I., § 17).

V. The provision (§ 39) is not in violation of the constitution, article VIII., § 3. 1. There is no liability on which to bring suit. 2. The last clause of section 3 merely clothes all corporations with capacity to sue and be sued, but has no relation to the power of the legislature over the law which shall determine the suit when brought.

VI. The provision does not leave the individual without remedy (see last clause of § 39), except where the injury occurs through the act of the officer in exercising a judicial duty; which, it is well settled, is *damnum absque injuria* (*Mills v. City of Brooklyn*, 32 *N. Y.*, 489, 496, &c.).

BY THE COURT.—DANIELS, J.—Under the law as it existed before the act of 1862 was passed, the power to cause the streets and avenues of the city of Brooklyn to be graded, paved, and kept in repair, and from time to time regraded and repaved, was vested in the common council (*Laws of 1854*, p. 860, ch. 384, title 4, § 1). And, for the purpose of supplying the means of exercising that power, it was provided that the expenses of all such improvements should be assessed, and be a lien, upon the property benefited by them. This was sufficient, after the street in question had been graded, paved, and curbed under the authority thus conferred, to render it the duty of the common council to observe reasonable care and attention in keeping it in that condition. And a careless omission to perform that duty, through which an injury should result to a person entitled to insist upon its observance, would be sufficient to maintain an action in his favor, in a court of justice, for the purpose of securing redress on account of the injury (*Mayor of N. Y. v. Furze*, 3 *Hill*, 612; *Wilson v. Mayor, &c. of N. Y.*, 1 *Den.*, 595; *Lloyd v.*

Gray *v.* City of Brooklyn.

Mayor, &c. of N. Y., 5 *N. Y.* [1 *Seld.*], 369; Mills *v.* City of Brooklyn, 32 *N. Y.* 489, 500.

But in the present case no such want of reasonable care and attention was shown on the part of the common council, for there was no evidence given on the trial tending to prove that this body had notice of the condition that the streets were in, or that by the exercise of proper diligence and circumspection it should have acquired knowledge of that condition.

Nothing like negligence on the part of the common council was, therefore, made to appear upon the trial of the cause.

Assuming, as, perhaps, that properly should be done, on account of the peculiar form given to the objection on which the motion for a nonsuit was granted, that negligence was shown on the part of the mayor and aldermen, in their omission to communicate to the common council the notice they had each of them received, which is certainly as far as this court can be justified in going under the evidence, then the question arises whether the action against the city should, on that account, have been maintained.

The difficulty in the way of doing that was created by the charter of the defendant (*Laws of 1862*, p. 203, § 39).

By this section it is provided that the city itself "shall not be liable in damages for any nonfeasance or misfeasance on the part of the common council, or any officer of the city, or appointee of the common council, of any duty imposed upon them or either of them by the provisions of titles four and five of this act, or of any duty enjoined upon them or any or either of them, as officers of government, by any other provision of this act, but the remedy of the party or parties aggrieved, for any such nonfeasance or misfeasance shall be by mandamus or other proceeding or action to compel the performance of the duty, or by other action against the members of the common council, officer or appointee, as

Gray *v.* City of Brooklyn.

the rights of such party or parties may by law admit if at all."

The section was very imperfectly and inartistically drawn, but from the fact that the act containing it was an amendment of the act of 1854, which contained titles four and five, while no such titles were contained in the amendatory act, and that those titles included many of the duties imposed upon the common council and officers of the city, it must be presumed that when the legislature used the terms, "this act," in its reference to those titles, it intended to refer to them as they were contained in the act of 1854, as it would be with that of 1862 incorporated into it by the amendments then made. The object of the legislature is clear, and that was to exonerate the city from liability on account of the omission and misconduct of its officers, and to impose all the legal consequences of their acts directly upon the persons who might be guilty of such official misconduct.

And that object can be secured by no other construction of this section.

Construed in this manner, then, it includes the present action, for the real ground of the complaint, upon which it was founded, was that two of the officers of the city had omitted to perform the duties officially enjoined upon them.

The plaintiff claims, however, that he should have been permitted to have maintained his action even under this construction of that section, and several reasons have been urged in support of that position.

The validity of those reasons will now be examined.

It is clear that the plaintiff had no vested right against the city when the act containing this section took effect as a law.

It was enacted on March 27, 1862, and, except one section not requiring notice, it went into effect as a law immediately, while the injury to the plaintiff's premises did not occur until the December following.

Gray *v.* City of Brooklyn.

This section did not impair the obligation of a contract within the prohibition of the Constitution of the United States upon that subject.

For, even though an implied contract arose out of the acceptance of the act of 1854, that the powers conferred by it should be used and observed for the benefit and advantage of the city, it was not a contract with the plaintiff, but between the city and the State, by whose sovereign act the charter had been conferred.

As to the plaintiff, the obligation on the part of the city was that of a mere duty, and not that of a contract.

But even if it had been, or could be deemed a contract with the plaintiff, still the legislature had the power to change, modify, or amend it, without conflicting with the provision referred to in the Constitution of the United States. For the authority under which the act was passed retained that power over it in favor of the legislature.

This was done in express terms when the power to create corporations was provided for by the present Constitution of the State, article VIII., § 51 of Constitution of 1846.

The language used was explicit, that all general laws and special acts passed pursuant to that section might be altered from time to time or repealed. When the act of 1854 was passed, it was with this important qualification attached to it by the Constitution.

And that was clearly sufficient to empower the legislature to make the change effected in it, if that was deemed advisable and expedient under the circumstances.

But it is insisted that the alteration made is inconsistent with the right to sue corporations conferred by the last sentence of section 3 of article VIII. of the Constitution.

But that is manifestly an erroneous view of this section.

For it was no part of the intention of that provision

Gray *v.* City of Brooklyn.

to render corporations liable upon all causes of action, the same as natural persons were, but merely to provide that actions might be maintained against them the same as they could against natural persons, provided the legal causes for doing so were found to exist.

It was to confer the capacity of being sued, not to define the cases in which suits might be maintained against them.

The right of action in cases of this kind arises out of the duty conferred by the statute in favor of the public, and that might have been qualified at the time of the enactment of the statute, precisely as it has been by this amendment.

The legislature had the power to determine the form in which the franchises and obligations of the municipal government should be conferred upon the city, and under the provision made by the Constitution, it did not part with the power by not exercising it at that time.

This section of the act of 1862 was not intended to divest the persons who might be affected by it of their right to redress, but to change and limit their remedies for injuries sustained by them.

And that power has always been deemed to be within the constitutional province of the legislature (Matter of N. Y. Protestant School, 31 *N. Y.*, 574-585). The redress may not always prove to be as entirely adequate to the injury as an action directly against the corporation itself; but even if that be conceded, it will not justify the conclusion that the act is in conflict with the Constitution on that account.

In theory the act places the responsibility for the wrongs of municipal officials where they justly belong—upon the persons by whose misconduct they may be produced.

It should have proceeded a step further than it has gone, for the purpose of securing complete redress to

Gray *v.* City of Brooklyn.

those entitled to demand it, by requiring the officials of the city, before they enter upon the duties of their offices, to give ample security for the payment of the judgments recovered against them under its provisions.

The judgment should be affirmed.

WOODRUFF, J. (Dissenting).—It is not denied, and probably can not be denied, that by virtue of its charter and the act to consolidate the cities of Brooklyn and Williamsburgh, passed in 1854 (*Laws of 1854*, ch. 384), it became and was the duty of the defendant to keep the streets of the city in repair, and that for failure to do so, the defendant was liable to a party who was injured thereby. The plaintiff in this action was nonsuited at the trial, on the sole ground that by the act of March 27, 1862 (*Laws of 1862*, ch. 53, § 39, p. 203), the defendants are relieved from any such responsibility.

By the act last referred to, it is provided that “the city of Brooklyn shall not be liable in damages for any nonfeasance or misfeasance of the common council or any officer of the city, or appointee of the common council, of any duty imposed upon them, or any or either of them, by the provisions of articles four and five of this act, or of any other duty enjoined upon them or any or either of them, as officers of the government, by any other provisions of this act; but the remedy of the party or parties aggrieved, for any such misfeasance or nonfeasance, shall be by mandamus or other proceeding or action to compel the performance of the duty, or by other action against the members of the common council, officer or appointee, as the right of such party or parties may by law admit *if at all.*”

The claim, therefore, made on behalf of the defendant, is that the city is not liable for the damages sustained by an individual from its omission to perform its duty to keep the streets in repair; but that if, by the

Gray v. City of Brooklyn.

rules of law, any or either of its officers are liable therefor, redress may be had, otherwise the party is remiss. An intention to produce such results is not to be imputed to the legislature, unless the terms of the enactment very clearly indicate such design. Against such a construction it is insisted that the liability against which it was intended to protect the city, is expressly limited to damages for nonfeasance or misfeasance of the common council or city officers, in the discharge of duties imposed or enjoined by the act of 1862 itself: that the expression "this act" clearly so limits the operation of the amendment, and that duties and responsibilities previously existing under the charter are not affected. Without inquiring whether the statute of 1862 should be thus strictly construed, or whether, on the other hand, the words "this act" may not mean the act which was thereby amended, another objection to the construction contended for seems to me well founded. The terms of the act of 1862 do not purport to exonerate the city from any absolute duty which, by force of the pre-existing laws, rested upon it as a municipal corporation, nor from the payment of damages if such duty be not performed. Granting, for the purposes of this discussion, that they are, by force of the act of 1862, relieved of responsibility for the misfeasance or nonfeasance of the common council, or of other officers in the discharge of any duty imposed upon them by any provision of the charter, there is no declaration that the city shall not be bound to the discharge of every duty imposed upon it as a municipal corporation, and be liable for a failure to perform it.

And to my mind there is nothing in the act in question indicating such an intention. Neither the terms nor the reason of the act import such an exoneration.

True, municipal corporations *ex necessitate* act by officers and agents, but absolute duties to act, and to perform, rest upon them, nevertheless, as they do upon

Gray *v.* City of Brooklyn.

individuals, and they are responsible for their failure, as a corporation, in the discharge of such duties.

Among other duties to which they are bound by strict legal obligations, is their duty to pay their debts, duly contracted. And yet, in the raising of money for the purpose, and in their application of the money when raised, they must act through their officers and agents. I apprehend that, if an action were brought against the city of Brooklyn, upon one of its bonds duly issued, the binding character of which was not questioned, counsel would not interpose a defense under the statute now in question, averring that the breach of duty or of obligation consisted in the non-payment of the money according to the tenor of the bond, and this arose from the failure of the officers or the common council to raise or appropriate the money, or the omission of their treasurer to perform his duty to pay it over.

There is abundant scope for the operation of the statute, according to its terms, without extending it to a liability not mentioned in it. In the discharge of the actual duties devolved upon the officers of a municipal corporation, they may be guilty of misfeasance and negligence to the injury of third persons, and the question has more than once arisen whether the corporation is liable therefor.

Sometimes such officers have been deemed to be agents of the corporation, and the latter liable on the principle of *respondeat superior*. Cases of this kind may be within the design of the statute, assuming, as before assumed, that the terms "this act" refer to the charter.

For example, the corporation may assume the duty to construct a sewer within a street of the city. For that purpose the proper officer or agent is directed to perform the work; in the act of performance he does something or omits something which he ought not to have done or omitted, and which works an injury.

People *ex rel.* Blossom *v.* Nelson.

This statute would be satisfied by holding that the injured party must look to him and not to the city for compensation. Suppose, moreover, that by reason of the construction of the sewer, the street should be or soon become in a dangerous condition. The general duty to keep the streets in repair would still rest upon the city, and its legal obligations would not be satisfied until by some means those repairs were made.

In short, the statute may be held to apply to those cases in which the corporation is sought to be charged for the misfeasance or nonfeasance of the officers as its agents. It by no means follows that there is not a clear liability of the corporation for a failure to perform a duty which rests upon it by law.

On this ground the judgment should be reversed.

MASON, J., concurred with WOODRUFF, J., as to construction of the act, but thought, in addition, that, in terms, the section in question was limited to the act of 1862.

All the other judges concurred in the opinion of
DANIELS, J.

Judgment affirmed, with costs.

THE PEOPLE *on the relation of BLOSSOM against NELSON.*

*Supreme Court, Third District; Special Term,
April, 1871.*

BENEVOLENT AND CHARITABLE ASSOCIATIONS.—
MANDAMUS.

The consent and approbation of a justice, required by the general law for the incorporation of benevolent societies (*Laws of 1848*, ch. 319),

People *ex rel.* Blossom *v.* Nelson.

as a condition precedent of filing the certificate, is not conclusive upon the secretary of state, nor upon the court, upon the question whether an association, as its objects are stated in the certificate, is within the purview of the statute.

A corporation cannot be formed under that act to provide a "relief fund," and "to aid persons of moderate pecuniary resources in obtaining from a respectable insurance company insurance on their lives, and in maintaining the necessary payments on the same, and to secure to families of persons so insured an immediate advance of funds in case of death."

In general, associations for lending money, however excellent the objects, are not within the statute.

Motion for a mandamus.

The relators, Josiah B. Blossom and others, applied for a mandamus against Hon. Homer A. Nelson, Secretary of State. The facts appear in the opinion.

Wm. P. Prentice & J. H. Reynolds, for the relators.

***A. J. Parker*, for the defendant.**

LEARNED, J.—This is a motion for a mandamus to compel the secretary of state to file a certain certificate of organization, made under the act, entitled "An Act for the incorporation of benevolent, charitable, scientific, and missionary societies," passed April 12, 1848, being chapter 319 of the Session Laws of that year. The certificate is signed by eight persons, and was acknowledged by them on April 8, 1871. The principal office of the society is in the city of New York. And there is attached to the certificate the following: "I consent to and approve of the filing of the within certificate," which is signed by one of the justices of the supreme court of the first judicial district.

The certificate was presented to the secretary of state on April 14, 1871, and he refused to file it in his office.

People *ex rel.* Blossom *v.* Nelson.

A certificate of the same association had been previously presented to the secretary of state for filing; and, on his refusal, a motion for a mandamus to compel him to file it, had been made at the March special term. This motion had been denied by Mr. Justice INGALLS, and the present certificate is modified so as to meet the objection stated by Mr. Justice INGALLS. There are still other objections, as the secretary of state believes, which are not obviated in the new certificate.

There are two important questions which arise on this motion :

1. Is the consent and approbation of a justice, which is indorsed on the certificate, conclusive upon the secretary of state, and on this court, upon the question whether the association, as its objects are stated in the certificate, is within the authority and meaning of the statute ?

2. If not, then is the association within that authority and meaning.

1. It was insisted by the relators, that the secretary of state could not review the decision of the justice who signed the consent, and that the secretary's duties were simply ministerial and subordinate. If this were so, perhaps it would follow that this court also must be bound by the action of the justice, and could not examine, either in this proceeding, or otherwise, whether the certificate were one authorized by the statute. Indeed, if the consent of the justice to the filing of the certificate is to be considered a decision of a matter submitted to him by the statute, then it might be doubtful whether a writ of *quo warranto* would lie against an association which had obtained a justice's approval, notwithstanding its expressed objects might be entirely beyond the provisions of the statute. Or, in other words, if, as the relators insist, the consent and approbation of the justice are conclusive on the secretary of state, such conclusiveness must be upon

People *ex rel.* Blossom *v.* Nelson.

the ground that the statute has submitted the matter to his decision. And it would seem to follow from this, that no other tribunal could review the action of the justice. So that a bank might be organized under the statute, if the *ex parte* consent and approbation of a justice could be obtained.

I cannot think that any such sweeping force is to be given to the act of the justice. Nor does the language of the statute warrant that construction. Section 1 authorizes five or more persons to make, sign, acknowledge, and file a certain certificate; and it adds that the certificate shall not be filed unless by the written consent and approbation of a justice. The approval of the justice, like the acknowledgment before a commissioner, is necessary to the certificate, but it is not conclusive on the question whether it is conformable to the statute. I am strengthened in this view by the decision of Mr. Justice INGALLS, above mentioned; for, in denying the motion for a mandamus, he must have held that the secretary of state was not concluded by the consent and approval indorsed on the certificate.

2. The certificate states, that the object of the society is, "benevolent, by the association and co-operation of its members, by their contributions, and the contributions of others, to provide a relief fund; also, to aid persons of moderate pecuniary resources in obtaining from a respectable insurance company insurances on their lives, and in maintaining the necessary payments on the same, and to secure to families of persons so insured an immediate advance of funds in case of death."

As far as I can understand from this language, by the plan of the society the corporators contemplate principally the lending of money. They propose to establish a "relief fund;" but it does not appear that any one is to be relieved by it. To name the money

People *ex rel.* Blossom *v.* Nelson.

contributed by the members and others a "relief fund," does not in the least show that it is to be used for a benevolent purpose. The use to be made of it is not, so far at least as stated, any more than it would have been, if the word "relief" had been omitted. The next object is to aid persons in obtaining insurances on their lives. The aid to be thus rendered cannot be in the seeking out life insurance agents. They are too easily found. It must be the advancing money to pay premiums. In other words, lending money for a specific purpose. And this, too, must be the meaning of aiding to the necessary payments. Plainly, also, the advance of funds to the families in case of death, is but a lending of money on the security of the policy. This is as much a matter of business as is the lending on any other security.

It seems to me evident, therefore, that the object of this society is the lending of money. And if this be so, the fact that the borrowers are expected to make a good use of the money, by applying it to the payment of premiums on life insurance, cannot alter the nature of the transaction. It is true, that a great deal of good may be done by lending money, perhaps even more than by giving it away. Still, I do not think that associations for lending money, however excellent the motives of the association may be, are within the meaning of this statute. In saying this, I do not mean to cast any imputation on the objects of this association. They may be in the highest degree praiseworthy and desirable. Banks and insurance companies are useful institutions, but they are not benevolent. And so I think that an association, the object of which is to aid its members by loans or advances of money, cannot be strictly called benevolent or charitable. The secretary of state refers to an act passed in 1870 (ch. 169), and to an act passed in 1871 (ch. 91), and points out that these two special acts seem to provide, substantially, for sim-

Metropolitan Board of Health *v.* Schmades.

ilar purposes with those sought to be accomplished under this association. He urges, and with great weight, that these acts give a construction, by the legislature and by the executive, favorable to his position ; that is, that the purposes of this association cannot be attained under the general act of 1848.

I have not examined the objections taken by the defendant's counsel to some details of the certificate of association, having decided to deny the motion upon the grounds above mentioned.

Motion for mandamus denied, with ten dollars costs of motion, to be paid by the relators.

METROPOLITAN BOARD OF HEALTH *against* SCHMADES.

New York Common Pleas ; General Term, December, 1870.

STATUTES.—INCONSISTENT LAWS.—POWERS OF BOARD OF HEALTH.

Of two statutes affecting the same subject and enacted the same day, the one bearing the higher number as a chapter of the laws, being a local act, and by its terms intended to take effect at a later day than the other,—*Held*, to control the other.*

Acts of the legislature (*Laws of 1866*, chs. 872, 873), having fixed the standard of, and the mode of keeping, petroleum, &c., it is not competent for a board of health to impose additional restrictions.

A general power given to a board of health to make ordinances not inconsistent with law, does not sanction the making of such additional restrictions.†

* Compare *Dawson v. Horan*, 51 *Barb.*, 459.

† As to the effect of the word "inconsistent" in a statute repealing

Metropolitan Board of Health *v.* Schmades.

Appeal from a judgment.

This action was brought by the plaintiffs to recover a penalty of fifty dollars, for an alleged violation of an ordinance passed by them on January 25, 1869, in the following words.

"That no petroleum oil, kerosene oil, or other liquid (having like composition or qualities as a burning fluid as said oil), shall be kept or offered for sale as a burning fluid for lamps, or in any receptacle for the purpose of illumination ; nor shall such oil or fluid be purchased for use, or be used as a burning fluid for any such lamp or receptacle, or be kept for such use, unless all such oil or fluid shall be of such quality and ingredients that it shall stand and be equal to both the following tests and conditions, to wit :

"1. That it shall not take fire or burn at a temperature below one hundred and ten degrees Fahrenheit ; and

"2. That it shall not evolve an explosive vapor at a temperature below one hundred degrees Fahrenheit."

The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The justice sustained the demurrer, and dismissed the complaint. The plaintiffs appealed to this court.

George Bliss, Jr., for plaintiffs and appellants.

Cross, Rice & Holt, for defendant and respondent.

inconsistent provisions, or authorizing ordinances not inconsistent with law,—see *Moore v. Westervelt*, 3 *Sandf.*, 762 ; *Bartle v. Gilman*, 18 *N. Y.*, 260 ; *Mayor, &c. of N. Y. v. Hyatt*, 3 *E. D. Smith*, 156 ; *Rochester v. Barnes*, 26 *Barb.*, 657 ; *Harbeck v. Mayor, &c. of N. Y.*, 10 *Bosw.*, 366 ; *Devoy v. Mayor, &c. of N. Y.*, 35 *Barb.*, 264 ; *Matter of Divine*, 11 *Abb. Pr.*, 90.

Metropolitan Board of Health *v.* Schmades.

BY THE COURT.*—LOEW, J.—It appears that the complaint in this case was dismissed by the court below, on the ground that the plaintiffs had no authority to pass the ordinance, for an alleged violation of which this action was brought.

The power of the board of health to enact an ordinance like the one under consideration could not well be questioned (*Laws of 1866*, ch. 74, §§ 12, 20; *Id.*, ch. 686, §§ 1, 3; *Laws of 1867*, ch. 956, § 10), were it not for other legislation respecting the storage and sale of kerosene or petroleum. In 1865 an act was passed by the legislature (*Laws of 1865*, ch. 773, § 3), prohibiting petroleum, kerosene, and other oils from being stored or sold within the corporate limits of any city in the State, “the fire test of which shall be less than one hundred degrees Fahrenheit.” On May 4 of the following year, two other acts were passed (*Laws of 1866*, ch. 872, § 1; *Id.*, ch. 873, § 51), one of which amends the act of 1865 and changes the prescribed test to one hundred and ten degrees Fahrenheit, and the other enacts that “no refined petroleum, kerosene, earth or rock oil, or machinery oil, shall be kept upon sale or stored within the corporate limits of the city of New York, the fire test of which shall be less than one hundred degrees Fahrenheit.”

Although both of these acts were passed on the same day, we think the last mentioned one should be deemed the later and controlling statute, not only because its number is greater, and because it was passed with special reference to the city of New York,—while the former is applicable to all the cities in the State,—but also for the reason that it was not to go into operation until June 1, 1866, whereas the other took effect immediately upon its passage. Effect will thus be given to both statutes in the city of New York, one

* Present, C. P. DALY, Ch. J., and LOEW and VAN BRUNT, JJ.

Metropolitan Board of Health *v.* Schmades.

being in force from the date of its passage to June 1, at which time the other went into effect and repealed all other statutes in any case provided for by that act or inconsistent with its provisions, so far as the same relate to said city (*Laws of 1866*, ch. 873, § 62).

As the legislature has, in section 51 of the last-mentioned act, particularly specified what the fire test of refined petroleum, kerosene, and other oils shall be, in order to render the storage and sale thereof lawful, and also prescribed the circumstances under, as well as the kind of buildings in which the same may be stored, we think it is not competent for the Board of Health to create or impose additional tests or conditions as a prerequisite to the right to keep or sell such oil, as it has attempted to do in the ordinance referred to.

The claim of the plaintiffs that said ordinance is consistent with the act of the legislature, as the former only has reference to the keeping and offering for sale petroleum which is to be used as a burning fluid or for the purpose of illumination, while the latter relates to the storage and sale thereof generally, will not avail them. The act of the legislature prohibits the storage or sale of petroleum that does not come up to a certain test, which implies that it may be so stored and sold if it be of that test. Now the ordinance of the board of health prescribes another and different test, and forbids the keeping and selling thereof, notwithstanding the requirements of the law may be fulfilled. The two are, therefore, manifestly inconsistent with each other.

Besides, a violation of the statute in respect to the test fixed by it, would, necessarily, also be a violation of the ordinance; and if the latter were valid, a party offending would be subjected to two actions to recover distinct penalties for the same cause—one brought by the fire department and the other by the board of health.

Lienan *v.* Dinsmore.

Nor do we think that there is anything in section 10 of the act passed the year after the above law (*Laws of 1867*, ch. 956, § 10), which confers authority on the board of health to pass the ordinance in question. That section gives the board power to make ordinances upon all matters and subjects so far as the power of said board extends. But such ordinances must be consistent with the constitution and laws of this State (*Laws of 1866*, ch. 74, § 20; *Id.*, ch. 686, § 1), and, as we have already seen, the ordinance referred to is inconsistent with a law on the same subject, and is, therefore, invalid and of no effect. In our opinion the judgment of the court below was correct, and should be affirmed.

CHARLES P. DALY, Ch. J., and VAN BRUNT, J., concurred.

LIENAN *against* DINSMORE.

New York Common Pleas; General Term, January, 1871.

EVIDENCE TO CHARGE COLLECTING AGENT.—BURDEN OF PROOF.—EXPRESS COMPANY'S RECEIPT.

To sustain a recovery for more than nominal damages, in favor of the owner of commercial paper, against a collecting agent, for failure to give due notice of non-payment, there must be evidence that if due notice had been given, the plaintiff might have collected the amount, or some part of it.

Lienan v. Dinsmore.

Appeal from a judgment.

This action was brought by Michael Lienan and others, against William Dinsmore, President of the Adams Express Company.

It appears that the plaintiffs sold goods to one David Wolff, of Memphis, Tennessee, amounting to one thousand and thirty-seven dollars and fifty-six cents.

On December 26, 1866, the former drew a draft on the latter for that sum, payable at sight to the order of the Adams Express Company, and on the same day delivered the draft to said company for collection.

The route of the defendants only extended to Bowling Green, Kentucky ; they, at that place, delivered the draft to the Southern Express Company for collection.

The receipt given by the defendants to the plaintiffs when the former received the draft, contained several stipulations or conditions, one of which reads as follows :

“ And if the said paper or proceeds is entrusted or delivered to any other express company or agent (which said Adams Express Company are hereby authorized to do), such company or person so selected shall be regarded exclusively as the agent of the depositor, and as such alone liable ; and the Adams Express Company shall not be in any event responsible for the negligence or non-performance of any such company or person.”

On February 27, 1867, the plaintiff wrote to the defendants to the effect that they had not received the proceeds of said draft, and that if they had suffered any loss by reason of the negligence of the defendants or their agents, they would hold them responsible.

On March 9, 1867, the original draft was returned to the plaintiffs by the defendants, with a note written by the agent of the Southern Express Company, which read as follows :

Lienan *v.* Dinsmore.

"D. Wolff has been sick for some time. Draft presented a number of times; promised to pay '*soon*.' On last presentation Mr. W. was found to have failed in business, and says it is impossible for him to pay.

"M. L. DOHERTY, Agent."

On the trial of this cause a clerk of the plaintiffs testified that between the time when he left the draft with the defendants and the time when the same was returned to the plaintiffs, he called a number of times at the office of the defendants and inquired about the draft or the money, but was always informed that they had not heard from it, and that they would write to their agents in Memphis.

This was contradicted by the evidence of a clerk in defendants' employ.

The court instructed the jury that if they believed the testimony of plaintiffs' clerk, the plaintiffs would be entitled to recover the full amount of the draft.

To this charge defendants' counsel excepted, as also to the refusal of the court to charge that upon the evidence the plaintiffs were entitled to recover only nominal damages.

The jury thereupon found a verdict for the plaintiffs for the full amount of the draft with interest from its date.

The defendants appealed.

Blatchford, Seward & Da Costa, for defendants, appellants.

T. S. Alexander and *R. P. Lee*, for plaintiffs, respondents.

LOEW, J.*—An express company may be deemed a common carrier, and, like the latter, may restrict or limit their liability by express contract; but it may well be

*Present, ROBINSON, LOEW and LARREMORE, JJ.

Lienan *v.* Dinsmore.

doubted whether they can do so by a mere printed notice or condition on the receipt, which the party sending goods by or otherwise employing them may or may not have seen (*Dorr v. New Jersey Steam Navigation Co.*, 11 *N. Y.*, 485; *Bissell v. New York Central R. R. Co.*, 25 *N. Y.*, 442; *Belger v. Dinsmore*, 34 *How. Pr.*, 421). Assuming, but without deciding, that the defendants in this action could not thus limit their responsibility, or if they could, that the plaintiffs are correct in their views, and that the defendants, by their subsequent acts, must be deemed to have waived the condition in the receipt which they claim exempts them from all liability for the negligence of the Southern Express Company, to which they transferred the draft, and that they are estopped from saying that they passed the same over to said company, still I do not see how this judgment can be sustained.

It was admitted by the plaintiffs in their complaint, and also by a certain stipulation signed by their attorney and read on the trial, that, within a few days after the delivery of the draft to the defendants, and as soon as the same could be transmitted to Memphis—to wit, on or about December 31, 1866—and repeatedly thereafter, the agent of the Southern Express Company presented said draft for payment to the drawee, that payment thereof was repeatedly demanded, and that the said drawee neglected and refused to pay, although he repeatedly promised to do so.

It thus appears to be conceded by the plaintiffs themselves, that the defendants did all that could possibly be asked or required of them in regard to transmitting the draft to Memphis, and presenting the same to and demanding payment thereof from the drawee.

Now the evidence on the part of the plaintiffs shows that they never requested the defendants to return the draft, nor did they surrender the receipt and pay the charges, all of which was necessary, according to the

Lienan *v.* Dinsmore.

terms of one of the clauses in the receipt, before the defendants could be required to return the draft; and it may, therefore, be questionable whether they were bound to do so or not (*Newstadt v. Adams*, 5 *Duer*, 43; *Manhattan Oil Co. v. Camden R. R.*, 5 *Abb. Pr. N. S.*, 289; *Bostwick v. Baltimore & Ohio R. R. Co.*, 55 *Barb.*, 137).

However that may be, for, as already intimated, there are also authorities to the contrary, it is quite clear that the defendants should at least have given due notice to the plaintiffs of the non-payment of the draft; and, not having done so, they must be held liable to the plaintiffs for all the damages sustained by them by reason of their negligence.

But it seems to me that before the plaintiffs can recover more than mere nominal damages, they must show that they could, in all probability, have collected the amount of the draft, or some part thereof, from the drawee, if they had received the notice of non-payment which the defendants' duty in the premises required them to give (*Allen v. Suydam*, 20 *Wend.*, 321, 327-331).

The defendants having used due diligence in endeavoring to obtain payment of the draft, and having failed, the plaintiffs must show that they could have done better, and that there was at least a reasonable probability that they could have collected the amount of the draft, if they had been properly notified that the same was not paid, before they are entitled to recover the full amount thereof.

But having done that, I think they would be *prima facie* entitled to a verdict or judgment for that amount, and the onus would then be upon the defendants to prove that the real loss or damage sustained by the plaintiffs in consequence of the negligence imputed to them was not the whole amount of the draft.

There is not a particle of evidence in the case to

Lienan v. Dinsmore.

show that payment of this draft, or any part thereof, could have been obtained, either by legal proceedings or otherwise, between the time when it was first presented to the drawee for payment and the time when the plaintiffs were notified of its non-payment.

From the facts and circumstances of the case, the probabilities seem to me to be all the other way.

In my opinion the jury should have been charged, as the chancellor thought they should have been instructed in *Allen v. Suydam (supra)*, viz :

That upon the evidence, the plaintiffs were only entitled to nominal damages ; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable that the plaintiffs might have sustained by reason of the delay of the defendants in notifying them of the non-payment of the draft.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

ROBINSON, J.—I am of the opinion :

1. That the obligation of the American Express Company in reference to the collection of the draft drawn by plaintiff, on D. Wolff, of Memphis, was not that of common carriers of goods, but simply as bailees for hire.

2. That the receipt they gave the plaintiffs on delivery of the draft for that purpose, and which was accepted as expressive of their obligation, embodied the contract they made in respect thereto, and that none of the decisions of the courts, made in jealousy of the attempt of common carriers, in such receipts, to repudiate or restrict their common law liabilities, are applicable thereto.

3. That by entrusting the draft to the Southern Express Company, which transacted such business south of Bowling Green, Kentucky, either as another ex-

Lienan v. Dinsmore.

press company or as agent they, within the terms of their contract, divested themselves from responsibility for any acts of omission by that company.

4. But, if otherwise, that there was no proof of any such change in the pecuniary condition of D. Wolff, in the interval between the presentation of the draft and the notice to the plaintiff of its non-payment, so that in consequence of his intermediate failure or from any other circumstance connected with their relations as creditors and debtors, they had sustained any such pecuniary damage, resulting from such want of notice of non-payment, as the loss of the entire amount of the draft, and as the certain or probable consequence of the mere omission to advise them of its non-payment on presentation. It was not shown that their chance of collecting their debt from Wolff had been materially impaired by any such delay, or in fact, that they, beyond mere nominal damages, had suffered from the delay in notifying them of the non-payment of the draft on presentation.

No protest was required or necessary, and the mere neglect of the agent to give notice to his principal of the non-payment of a sight draft made by him, upon his debtor, does not, in its legal consequence, necessarily present any case of actual loss or damage.

I concur in the conclusion arrived at by Judge LOEW, that the judgment should be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed.

Society for the Reformation of Juvenile Delinquents *v.* Diers.

THE SOCIETY FOR THE REFORMATION OF
JUVENILE DELINQUENTS *against* DIERS.

Supreme Court; Special Term, February, 1871.

DRAMATIC PERFORMANCES.—NEW AFFIDAVITS.

Under the acts requiring a license for dramatic entertainments in the city of New York (*Laws* of 1839, p. 11; *Laws* of 1860, p. 999; *Laws* of 1862, p. 475),* an injunction lies to restrain *impromptu* characterizations, if performed on successive nights in a public hall, for admission to which a price is charged.

On a motion to dissolve an injunction, the plaintiff may read new affidavits in answer to any new matter, set up as explanatory, or in the nature of confession and avoidance, in the defendant's affidavits.

Motion to dissolve an injunction.

An injunction was granted in this action restraining defendant from giving musical and dramatic entertainments of the nature described in the opinion.

C. C. Egan, for the motion.

Cram & Robinson, opposed.

BRADY, J.—The act of 1839 (*Laws* of 1839, p. 11), provides, by section 1, that no theater, circus, or building, garden, or grounds for exhibiting theatricals, or equestrian performances in the city of New York, shall be opened for such exhibitions, unless the manager or proprietor thereof shall first and annually obtain from the mayor of the city a license therefor. It also provides, by the same section, that the manager

* As to these acts, compare *Laws* of 1871, ch. 721.

Society for the Reformation of Juvenile Delinquents *v.* Diers.

or proprietor neglecting to take out such a license before such exhibitions, shall be subject to a penalty of five hundred dollars. It also provides, by section 4, for an injunction restraining the opening, until the manager or proprietor shall have complied with the requisitions of the act.

The act of 1860 (*Laws of 1860*, p. 999), prohibits the exhibition on Sunday, to the public, in any building, garden, grounds, concert-room, or other room or place within the city and county of New York, of any interlude, tragedy, comedy, opera, ballet, play, farce, negro minstrelsy, negro or other dancing, or any other entertainment of the stage, or any part or parts therein, or any equestrian, circus, or dramatic performance, or any performance of jugglers, acrobats, or rope-dancing. It also provides that every person offending against the provisions of the act, and every person aiding in such exhibition, by advertisement or otherwise, and every person being owner or lessee, who shall lease any of the places named for the purpose of such exhibition or performance, or assent that it shall be used for that purpose, if the same shall be so used, shall be guilty of a misdemeanor, and in addition to the punishment provided therefor by law, shall be subjected to a penalty of five hundred dollars ; and if the violation be by manager or proprietor, or any other person having a license for the place in which such violation occurs, then the license shall become null and void.

The act of 1862 (*Laws of 1862*, p. 475), provides that it shall not be lawful to exhibit to the public in any building, garden, or grounds, concert-room, or other place or room within the city of New York, any interlude, tragedy, or comedy, opera, ballet, play, farce, negro minstrelsy, negro or other dancing, or other entertainment of the stage, or any part or parts therein, or any equestrian or dramatic performance, or any performance of jugglers, or rope-dancing, or acro-

Society for the Reformation of Juvenile Delinquents *v.* Diers.

bats, until a license therefor shall have first been had and obtained, pursuant to and at the same rate provided for theatrical performances in the act of 1839 (*supra*). It also provides, that every manager or proprietor of any such exhibition or performance, who shall neglect to take out the license, or consent to, cause, or allow any such exhibition or performance, or any single one of them, without such license, shall incur the penalties, and be subjected to the provisions for an injunction, provided for in the act of 1839 (*supra*). The act also subjects to the same penalties the owner or lessee of any building, or of any of the places mentioned, who shall lease or let the same for the purpose of any such exhibition or performance, or who shall assent that the same be used for any such purpose, unless permitted by a license previously obtained therefor, and then in force, provided, however, that such place shall be so used in accordance with such letting or consent.

The act of 1862, when compared with the act of 1839, will be found to be much more comprehensive and sweeping, embracing all kinds of dramatic performances and entertainments of the stage besides those expressly designated, and any part or parts therein. If the exhibitions, therefore, at the defendant's garden, are included in the terms opera, farce, interlude, comedy, tragedy, play, ballet, or are in their nature dramatic, or are entertainments of the stage, or any part or parts therein, they are within the prohibition of the statute, and cannot be given without a license.

The language employed in the acts of 1860 and of 1862 leaves no doubt of the intention of the legislature, in regard to the character of the exhibitions or performances, for which licenses are to be procured, or of the places in which such exhibitions or performances being publicly given, shall be within the prohibitory design. The defendant is proprietor of the "National

Society for the Reformation of Juvenile Delinquents v. Diers.

Garten," a public place of resort ; and, as appears from the proofs on behalf of the plaintiffs, the interior of the building is fitted up for theatrical performances, with a raised stage, orchestra, drop-curtain, side scenes, foot-lights, and such other arrangements as are usual where theatrical performances are given. It also appears that in August, 1870, and on the twenty-third day thereof, there was a performance on that stage by actors dressed in costume adapted to the characters of that piece, consisting of a farce in two acts, in the German language, called "*Dienstboten Wirthschaft*" ("Servants' Housekeeping"), and on August 29, 1870, a farce in one act, and a comedy in two acts, performed by four actors in the former, and six in the latter, all dressed in costume adapted to the characters of the piece. It also appears that for admission to the "Garten" ten cents is charged, and was paid.

The defendant, in answer to these statements, says that his Garten is kept for refreshments for visitors, for concerts, vocal and instrumental, and denies that on the days hereinbefore mentioned, there was such a stage or theatrical performance as charged by the plaintiffs. He does not deny that the performance on August 23 was designated by name as alleged, or that he charges ten cents for admission to his garden, nor does he explain the nature of the performances, in detail, which he calls concerts, vocal and instrumental, otherwise than by referring particularly to one of the affidavits made on his behalf, and annexed to his deposition. It appears by that affidavit that there is, as usual, a raised platform, but it is alleged to be in no sense a *regular* theatrical stage, having no foot-lights, nor drop-curtain, nor scene shifting, and it is said that while the visitors were enjoying their refreshments on August 23, two persons went upon the platform and sang an impromptu piece, with occasional impromptu dialogue; but it is averred that the exhibition was in no sense a the-

Society for the Reformation of Juvenile Delinquents *v.* Diers.

atrical one, and that it was not a written farce. It is stated, however, that the song and dialogue were for the amusement of the persons present; those persons, it must be borne in mind, having paid ten cents for the privilege of entering the "Garten" and enjoying its entertainments. In that affidavit it is also said that the performance given on August 29, "wrongly called a farce" in one act, with four actors, and a comedy in two acts, with six actors in costume, was simply solos, duets and other songs, given impromptu, and relating to the last battle between the Prussians and French, at Weissembourg. It is not denied, be it observed, however, that these actors were dressed in costume appropriate to the piece. It is not stated, either, that these actors were not in the employment of the defendant.

Assuming that the artists who thus appeared have the gift of impromptu song, duet, dialogue, and histrionic representation, sufficient, with the limited number of six, to portray the battle at Weissembourg, between the French and Germans, the performance was, nevertheless, in its character, dramatic or theatrical. The raised stage or platform, the song, duet, dialogue, and costumes are not the occurrences of private life, impromptu or otherwise, except occasionally, when, to beguile the weary hours, or in the better effort to aid some noble charity, amateurs may don the glittering robes of the noble, or the simpler attire of gentry or peasantry, and assist, to some extent, at least, to show that indeed "all the world's a stage and men and women only players," and the exhibitions thus given are not continuous, but isolated; and not in any sense public in public places, as suggested by the counsel for defendants. They are the exceptions, not the rule.

If we seek for the definitions of the words of the statute, we find that a play is a "dramatic composition," "a drama," "tragedy," "comedy," or "farce," "a composition in which characters are represented by

Society for the Reformation of Juvenile Delinquents v. Diers.

dialogue and action." We find, also, that an interlude is "a short dramatic piece, and generally accompanied with music," though usually represented or performed between the acts of longer performances; and that a farce is "a short dramatic entertainment in which ludicrous qualities are greatly exaggerated for the purpose of exciting laughter," "a short play of low comic character" (*Vide Worcester's Dictionary*). It is not essential to the creation of any one of these defined compositions, that it should be written. It may be impromptu, and be an interlude or farce, the details having been agreed upon, and each actor left to his own capacity to make it harmonious or ludicrous. It is enough, under the broad provisions of the statutes referred to, that the result of the combination is a theatrical entertainment. It must also be said that songs and duets sung by persons in costume may be parts of a dramatic, theatrical or operatic entertainment, and must be so regarded, when connected with dialogue and sung in a public garden, for admission to which a charge is made.

Upon the defendant's case, therefore, taken in connection with averments made by the plaintiffs and not denied, it is clear that the exhibitions or performances at his place are within the prohibitions contained in the statute, and that he is not justified in giving them without the license therefor which he is required to obtain.

On the argument of this motion objection was taken to affidavits which the plaintiffs claimed the right to read, in answer to those presented on the part of the defendant. It was then suggested by the court that the affidavits might be read in reference to any new matter set up in the papers submitted on the part of the defendant. The assertion that the performance was impromptu is new matter. It is coupled with a denial that the exhibition complained of was, as alleged, a farce or comedy, and is, therefore, explanatory, or in the nature

Society for the Reformation of Juvenile Delinquents *v.* Diers.

of a confession and avoidance. The answering papers of the plaintiffs are, therefore, to be considered.

From these it appears that the defendant, in one of the proceedings against him by the plaintiff, signed a paper and described himself as a theatrical manager. It also appears that on the occasion of August 23, as a substitute for programmes, there was a bulletin board arranged on the wall of defendant's premises, on which was written "Zum Schluss-Dienstboten Wirthschaft" "Finale: Servants' Housekeeping," a fact which affects the probability of the exhibitions being impromptu, and justifies a conclusion to the contrary; and it appears in reference to the play of August 29, that actresses participated in the performance, and that, in one of the compositions, but two songs were sung. Other facts and circumstances appear, to which I make no reference, inasmuch as they may not be responsive to the new matter urged as relevant and important for the defendant.

It is quite apparent from these facts and circumstances, that the defendant must, if he designs to continue his business in the mode heretofore conducted, seek a license. The legislature has said that it must be done, and as the law affects all equally, there is no reason why all should not be required to bear its burdens. It is not by these statutes intended to interfere with the theatrical amusements of the people, but to exercise a salutary supervision of them, and to compel the persons who thus cater for the public pleasure in public places, and for their own aggrandizement, to pay for the privilege; the license fee and the penalties that may be recovered for violations of the law being appropriated for the benefit of the plaintiffs' institution, which is regarded as one of great usefulness.

I have set out, more at length than was necessary, perhaps, the statutes bearing upon the question discussed; but the subject is important, and it is im-

Carpenter *v.* Keating.

portant that the defendant and others should understand that public exhibitions of a theatrical, operatic, dramatic, or equestrian character, cannot be given in this city in any place opened for that purpose, without a license therefor, as long as the statutes referred to remain unrepealed.

It is only necessary to say further that the existence of another action for a violation of the statute of 1860, (*supra*), by giving a performance on Sunday, has no bearing on the plaintiffs' right to an injunction herein. The cause of action in that case is wholly independent of that of which this action is predicated.

For these reasons the motion to dissolve the injunction must be denied.

Ordered accordingly.

CARPENTER *against* KEATING.

New York Common Pleas; General Term, December, 1870.

CROSS ACTION.—INJUNCTION.—SECURITY ON INJUNCTION TO STAY PROCEEDINGS.

As a defendant can now, as a general rule, interpose any defense he may have, whether legal or equitable, and thus obtain, by answer, motion, or otherwise, all the relief, in the original suit, to which he would be entitled if he brought a separate action, it is neither necessary nor allowable to bring an action, nor will an injunction be granted, merely for the purpose of restraining the proceedings in another action, both being in the same court.*

* In *SAMPSON against Wood* (*Supreme Court, First District; Special Term, October, 1869*), where defendant was prosecuting a proceeding in the surrogate's court, and also another in the supreme court, contrary to the terms of a compromise and release, which, how-

Carpenter v. Keating.

Where such an injunction was granted, but no bond was given or money deposited, as required by 3 *Rev. Stat.*, 5 ed., p. 270,—*Held*, on appeal, that even if the plaintiff had been entitled to the relief he sought, the failure to comply with the statute was fatal to the order of injunction appealed from.

Appeal from an order.

This action was brought by William H. Carpenter and William H. Adams, Jr., against Francis T. Keating and Henry A. Keating.

ever, she claimed was obtained from her by fraud;—*Held*, that an action might be maintained for an injunction restraining the prosecution of either proceeding, until the determination of the question of fraud in such action.

Motion for an injunction.

This action was brought by George G. Sampson and William F. Romer, executors of John H. Baldwin, deceased, against Cecelia F. Wood, to enjoin the defendant from proceeding in the surrogate's court to have the probate of the testator's will revoked, and also from proceeding in this court to have a judgment, which had been obtained against her, opened.

The complaint set forth the facts in detail, alleging that the controversies between the parties had been settled by them with full knowledge of the facts on the part of the defendant, and that the defendant, by the compromise and release, had barred herself from prosecuting the proceedings in question, and had agreed to abandon all claim against the estate, and all claim to having been the wife of the testator.

In her affidavits in opposition to the motion, the defendant alleged that the settlement alluded to was obtained from her by fraud or collusion, and that it was executed by her without a proper understanding of its meaning and effect; and the allegations of the complaint were denied.

John Graham, William Fullerton, and John L. Sutherland, for the motion.

Winter & Gage, opposed.

CARDOZO, J.—There is one point which has not been fully presented by counsel. Plaintiff seeks to enjoin the continuance of two actions

Carpenter *v.* Keating.

It appeared that some time in the year 1868 an action was commenced in the supreme court by one Frederick Daggett, against the defendants in this case, which action was superseded by an agreement to arbitrate the

or proceedings, on the ground that there are certain covenants which have been executed by the defendant, and which, if effect be given to them, will bar her from prosecuting these actions. The defendant, on the other hand, says that these covenants are a fraud upon her. The court, on this motion, cannot decide the question of fraud, and that question cannot be determined in the surrogate's court, in which one of these proceedings is pending. Ought not, then, this court, as a court of equity, to restrain the defendant from prosecuting either proceeding, until the question of fraud can be determined in the proper court.

Mr. Winter was heard in reply; and, after consideration by the court, the following opinion was rendered.

CARDOZO, J.—Reflection has only strengthened and confirmed the opinion which I expressed on the argument of this motion.

The plaintiffs seek the enforcement of a covenant entered into in settlement of a disputed claim. The making of the covenant is not denied by the defendant, Wood, and it is of that character—setting at rest claims likely to lead to protracted litigation, and enabling the estate of a deceased person to be the more speedily closed—which it is of the highest interest and of the greatest public importance (as it quiets titles and ends suits), to favor, and, when fairly made, to sustain. The defendant, Wood, notwithstanding her covenant, is proceeding to assert rights inconsistent with it, and to assert them in part in a court where, at least, it may be questionable whether the covenant can be available to the executors.

That presents precisely such a case as calls for the interposition of the equity powers of this court to stay such proceedings, and to oblige the parties to litigate the question which arises on the validity of the covenant in one action, which, like the present, affords opportunity to do full and complete justice to all. If the covenant were fairly entered into, the defendant, Wood, should be perpetually enjoined from setting up any claims inconsistent with it, and that is what this action seeks. Presumptively the covenant is binding. The defendant, Wood, seeks to avoid it by charging fraud. Her charges are denied by the plaintiffs, and until she establishes her case, her solemn act, under her hand and seal, must stand and bind her.

Whether her charges be true or not, should not be tried upon affi-

Carpenter *v.* Keating.

matters in difference between the parties ; judgment upon any award made under said submission to arbitrate to be entered in the court in which the action was originally commenced.

The arbitrators made their award against said Daggett, and a motion was subsequently made in the supreme court to set the same aside for fraud and collusion between some of the arbitrators and the successful parties on said award, the defendants in this action.

The motion was granted at special term ; but on appeal to the general term the order of the special term was reversed, whereupon said Daggett appealed to the court of appeals, the plaintiffs in this case becoming sureties on the undertaking.

The court of appeals, on September 28, 1869, dismissed the appeal, with costs, on the ground that the proper remedy to bring the matter up for review in that tribunal was by writ of error.

Thereupon the defendants herein perfected a judgment against said Daggett, and on or about October 7, 1869, commenced an action in this court against the plaintiffs herein as sureties on the undertaking above mentioned, to recover the sum of sixteen hundred and sixteen dollars and twenty-four cents, being the amount of the judgment obtained by them against said Daggett at the general term of the supreme court, and the further sum of one hundred and one dollars and ninety-six

davits on a preliminary motion ; and I therefore refrain from reviewing the affidavits or expressing any opinion here upon the facts. The motion to continue the injunction until final judgment must be granted.

The other motion for judgment upon failure to answer, and for want of an appearance, passes as of course upon filing the requisite proofs of service and of a default. That will not prejudice the defendant, Wood, as she can apply upon proper papers to open the default, and to be allowed to come in and answer.

Motion granted.

Carpenter *v.* Keating.

cents costs, awarded to them on the dismissal of the appeal by the court of appeals.

At or about the same time the said Daggett sued out a writ of error from the supreme court to the court of appeals, and filed a bond (which did not, however, secure the costs awarded to the defendants herein on dismissal of the appeal by the court of appeals), on which the plaintiffs in this action are also sureties, and obtained a stay of proceedings until the determination of said writ, which is still pending.

On October 14, 1869, the plaintiffs herein commenced this action to restrain, by a perpetual injunction, the other action in this court, brought against them as sureties on the undertaking on appeal, by the defendants in this case. A preliminary injunction was granted in this last named action, and on a motion to continue the same *pendente lite* an order was made by Judge BRADY that the same be continued on payment of the costs awarded to the defendants herein on the appeal to the court of appeals, and the costs of the action sought to be restrained.

On December 22, 1869, the answer which had been interposed by these plaintiffs in the action sought to be restrained was overruled on demurrer, but the entry of judgment thereon was stayed for ten days; and if within that time these plaintiffs paid the costs as directed by Judge BRADY, and the costs on the demurrer, they were to be at liberty to apply either for a continuance of the stay in that action, or the injunction in this, as might be deemed advisable. Said costs having been paid, an application was made by these plaintiffs for a continuance of the injunction herein, and on January 26, 1870, an order was made by Judge VAN BRUNT, enjoining and restraining the defendants in this action from further proceeding in the aforesaid other action in which they are plaintiffs, and the plaintiffs herein are defendants, until the final judgment and decree in this

Carpenter *v.* Keating.

suit. No bond was executed or money deposited in court on the issuing of this order. From this last named order this appeal was taken.

R. H. Channing, for defendants and appellants.

A. L. Sanger, for plaintiffs and respondents.

LOEW, J.—This action was brought for the purpose of enjoining and restraining proceedings in another action also pending in this court. As a defendant can now, as a general rule, interpose any defense he may have, whether it be legal or equitable, and thus obtain by answer, motion, or otherwise, all the relief in the original suits to which he would be entitled if he brought a separate action, it is no longer either necessary or allowable to bring an action, nor will an injunction be granted, merely for the purpose of restraining the proceedings in another action, both being in the same court (*Harman v. Remsen*, 23 *How. Pr.*, 174; *Minor v. Webb*, 10 *Abb. Pr.*, 284; *Bowers v. Tallmadge*, 16 *How. Pr.*, 325; *Arndt v. Williams*, *Id.*, 244; *Hunt v. Farmers' Loan & Trust Co.*, 8 *Id.*, 416).

It is true that injunctions are sometimes allowed for the purpose of preventing a multiplicity of suits. But that is not this case. On the contrary, the very bringing of this action was a multiplication of suits.

But even if the plaintiff were entitled to the relief he seeks in this suit, the fact that no bond was given or money deposited with the court, as required by the Revised Statutes (3 *Rev. Stat.*, 5 ed., p. 270), is fatal to the order appealed from.

Those provisions of the Revised Statutes have not been abrogated or altered by the Code (*Cook v. Dickerson*, 2 *Sandf.*, 691), and are, therefore, still in force, and a compliance therewith is necessary as a condition precedent to the issuing of an injunction staying proceed-

Matter of Eager.

ings in an action at law. The plaintiffs herein may perhaps be entitled to a stay of proceedings in the other action in which they are the defendants, or upon any judgment therein against them, until a decision be rendered by the court of appeals on the writ of error now pending in that court; but it would seem that this action cannot be sustained, and that, in any event, the order appealed from must be reversed.

CHARLES P. DALY, Ch. J., concurred.

Order reversed.

12/20/66. n. 3. 151,
Affirmed,
46 N.Y. 100.

MATTER OF EAGER.

Supreme Court, First Department, First District;
General Term, January, 1871.

ASSESSMENTS.—APPLICATION TO SET ASIDE.

The act of 1870, ch. 383, in regard to assessments for the repaving of streets in New York, has no retroactive effect.*

The principle upon which an assessment was made, was not, under the act of 1858 (*Laws of 1858*, p. 574, § 2), the subject of review. An error in the principle is not a "legal irregularity," within the meaning of that act.

An assessment for laying cross-walks of stone, where stone crosswalks are not laid, and none others authorized, is an irregularity.

No authority is given by the statute to include an allowance to the contractors for extra compensation for doing the work before the time fixed by the contract.

Proceedings under the act of 1858, to vacate an assessment.

* As to that act compare Matter of McCormack, and Matter of Wilks, *infra*, p. 234, and note.

Matter of Eager.

These proceedings were brought to vacate assessments imposed on the property of the petitioner, for paving Irving-place, Nineteenth, and Sixteenth-streets, in the city of New York, with Nicolson pavement. The proceedings were taken under the acts in relation to frauds in assessments for local improvements in the city of New York (*Laws of 1858*, p. 574, ch. 378).

The resolutions and ordinances relative to each street provide that the streets be paved with Nicolson pavement where not already paved with Belgian pavement, and cross-walks laid or re-laid at intersecting streets. No cross-walks were laid or re-laid at the intersection of Irving-place with Sixteenth or Nineteenth-street.

The advertisements issued by the croton aqueduct department called for proposals, and bids for contracts, for laying the Nicolson pavement, which is a patented article, and which the Nicolson pavement company have the exclusive right to lay in the city of New York.

Only one bid for each street was received, which was made by the Nicolson pavement company, and the contracts were made with that company to do the work.

This company laid in the streets elsewhere than at the intersections with Irving-place, cross-walks or bridge stones, the charge for laying which exceeded, in each street, the sum of two hundred and fifty dollars.

In the advertisement for proposals for bids there was no mention of cross-walks.

In each of the assessment lists there was included a charge of three dollars and fifty cents per day, for each day the work was completed prior to the time agreed upon in the contract.

It appeared from the testimony of John T. Tully, secretary of the board of assessors, that the charges for the collection of the several assessments exceeded the two and one-half per cent. on the items of the assess-

Matter of Eager.

ments, after deducting therefrom the item for collection. The ordinance of the common council allows to the collector and his deputies an equal part of two and one-half per cent. on all items of assessments collected by the bureau, for the collection of assessments during their term of office, and of two per cent. on all unpaid items of assessments returned during their term of office to the bureau of arrears. The estimate of the cost of collection was based on the supposition that the whole amount of the assessment would be received by the collector during the year the assessment was in his hands, and, therefore, that he would be entitled to two and a half per cent. on the whole amount, instead of but two per cent., which he is authorized to receive for the sums not collected by him.

And it appeared that the collector of assessments not only had two and one-half per cent. upon the expenses, but also the same percentage on his own fees. These proceedings were instituted in February, 1870, and the testimony taken from time to time, prior to April 13. On April 20, 1870, the cases were argued before Mr. Justice BRADY, at special term, by:—

Abraham R. Lawrence, Jr., for petitioners.

A. J. Vanderpoel, for the mayor, aldermen, &c.

BRADY, J.—There are two objections taken to the assessments imposed upon the lands of the petitioners which are well taken.

First. The charge for cross-walks of stone, none having been laid, and none others having been authorized.

Second. The charge of collection in excess of two and a half per cent. allowed by law. These charges are legal irregularities within the decisions of this court relative thereto, and the assessments must be va-

Matter of Eager.

cated under the act of 1858 (*Laws of 1858*, p. 574, § 2), Matter of Wood, 51 *Barb.*, 276; Matter of Lewis, *Id.*, 2; S. C., 35 *How. Pr.*, 162; Matter of Babcock, 23 *Id.*, 118; Matter of Beams, 32 *Barb.*, 79; S. C., 17 *How. Pr.*, 459; Matter of Buhler, 19 *Id.*, 317; Matter of Astor, not reported).

Section 27 of the act of 1870, ch. 383, passed April 26, 1870, might render these objections valueless, but that act was not passed when these applications were heard; and it has no retroactive effect; and the irregularities under its provisions, therefore, cannot be remedied. I have examined all the points submitted in reference to the proceedings for the assessments objected to, and my judgment is that none of them, except those embracing the items mentioned, are well taken.

I deem it unnecessary to say anything further in deciding these applications, except that the principle upon which the assessment is made is not the subject of review under the act of 1858, *supra*. If erroneous, it is not a legal irregularity within the meaning of that act. The land of the petitioners and others subject to assessment for the improvement made may, therefore, be again assessed, as provided by the act of 1858, *supra*, the charge for cross-walks and the charge for collecting already considered being excluded from the expenses of the improvement, and the expenses of the new assessments being also excluded.

From the order entered on this decision the mayor, aldermen, and commonalty appealed to the general term.

A. J. Vanderpoel, for the appellants.

Abraham R. Lawrence, Jr., for the respondents.

BY THE COURT.—INGRAHAM, P. J.—We have heretofore held that the act of 1870 did not apply to cases which had arisen before the passage of the act, but

Matter of Eager.

that such act was prospective, only, in requiring the amount erroneously assessed to be deducted. There can be no doubt of its having been irregular not to lay the cross-walks as directed by the ordinance, and yet to charge upon the owners of lots the cost of laying them. The cost of laying Nicolson pavement was \$4.95 per square yard ; the cost of the bridge stones was \$1.30 per foot—nearly three times more than the wooden pavement. It would not require any great stretch of the imagination to find that such a charge was a fraud on the lot owners, which entitles them to the relief sought.

The charge of two and one-half per cent. for collecting was not, in my judgment, erroneous. The statute gives that amount on moneys collected. This charge, as well as the cost of the work, has to be raised by an assessment on the property, and the whole sum when collected is paid into the treasury. The statutes evidently give the percentage on the whole amount assessed and collected.

It may well be doubted whether the contract was properly made to include an allowance to contractors for extra compensation if the work was done before the time fixed in the contract. No such authority is given by the statute authorizing the assessment, nor does the ordinance directing the improvement provide for it. We see no authority for the department to agree to pay extra sums to the contractor, not for doing the work, but for doing it quicker than he would otherwise do it. It is opening a door for abuses which, by extending the time for completing the work, may give to a contractor large sums of money for which he would render no equivalent.

Order appealed from affirmed.

Matter of McCormack.

MATTER OF McCORMACK.

Supreme Court, First District; Special Term, 1870.

ASSESSMENT.—IRREGULARITY.

Under the act of 1870 (*Laws* of 1870, ch. 383, § 27), the omission to advertise for bids or sealed proposals for cross-walks to be laid, although embraced within the resolution of the common council, is not necessarily fatal to the assessment, for the excess may be deducted; though it would have been fatal under the act of 1858.*

* On the petition of WILKS (at the July special term, 1870), it was held, that an assessment should not be vacated for including an unlawful charge, but, under the act of 1870, may be modified by deducting it.

In that case, Matthew and Eliza Wilks petitioned to vacate an assessment.

John Ely, for the petitioners.

BRADY, J. (after disposing of other questions).—The objection to the charge of four hundred and two dollars and forty cents for new bridge stone cross-walks has heretofore been held to be well taken in applications kindred to this, and must, therefore, be sustained.

The effect will not, however, be to vacate the assessment. It is provided by section 27 of the "act to make further provision for the government of the city of New York," passed April 26, 1870 (*Laws* of 1870, ch. 383), that if, upon the hearing in relation to frauds in assessments for local improvements, under the provisions of the act of 1858, it shall appear that, by reason of the alleged irregularity, the expense of such improvement has been unlawfully increased, the judge may order that such assessment upon the lands of the party aggrieved be modified, by deducting therefrom such sum as is in the same proportion to the whole assessment, as is the whole amount of such unlawful increase, to the whole amount of the expenses of such local improvement. Such a deduction is ordered to be made as the only relief to which the petitioners are entitled.

Matter of McCormack.

An objection that, in paving a street, the space between the rails of a railroad company was not paved, relates to an omission of which petitioners to vacate the assessment cannot complain, since it lessens the amount of the assessment; and the omission is not a legal irregularity.

The selection by the common council of a patented pavement is not a legal irregularity.

An excessive charge for expenses will not be fatal to an assessment, but may be corrected by the court.

The principle on which the assessment is made cannot be reviewed by proceedings under the act of 1858.

Motion, under the act of 1858, to vacate an assessment.

This was a petition brought by William H. McCormack and others, to vacate the assessment for paving Sixth-avenue, from Forty-second-street to Fifty-ninth-street, with Nicolson pavement.

Mr. Lawrence, for the petitioners.

Richard O'Gorman, opposed.

BRADY, J.—I have carefully and fully considered, I think, all the objections presented by the petitioners to the validity of the assessment which they seek by this proceeding to set aside, and in disposing of them shall state briefly the reasons which control my judgment:

1. The omission to advertise for bids or sealed proposals for cross-walks to be laid or re-laid, although they were embraced in the resolution of the common council, as well as the Nicolson pavement, was, it is true, a legal irregularity under the act of 1858, within the decisions of this court relating thereto (*Laws of 1858*, p. 574, § 2; *Matter of Wood*, 51 *Barb.*, 276; *Matter of Lewis*, 35 *How. Pr.*, 162; *Matter of Babcock*, 23 *Id.*, 118; *Matter of Buhler*, 19 *Id.*, 317; *Matter of Beams*, 17 *Id.*, 459; *Matter of Astor*,

Matter of McCormack.

MS.) ; but under the provisions of section 27 of the act of 1870, ch. 383, it is not necessarily fatal to the assessment. That section declares that if, upon a hearing such as that which was had herein, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of the aggrieved party may be modified, by deducting therefrom such sum as is in the same proportion to such assessment, as the whole amount of such unlawful increase is to the whole amount of the expense of such local improvement, and the application of these remedial provisions will obviate the objection stated. I have not discovered in the proofs submitted any reason why it should not be done, and have determined, therefore, that the charge for cross-walks should be deducted from the assessment, in the manner and on the principle declared in the statute.

2. The objection that the space between the rails of the Sixth-avenue Railroad Company was not paved, relates to an omission of which the petitioners cannot complain. The expense of the improvement would be increased if that work had been done ; and that it was not done was a pecuniary advantage to them, lessening the burden which they had to bear. It is not a sufficient answer to this view, that the resolution of the common council directed the Sixth-avenue to be paved. Such direction must be presumed to have been resolved upon with reference to that part of the avenue, the obligation to pave and repair which rested alone upon the corporation. If, however, such a presumption may not be entertained, it would be equally improper to hold that a proceeding, which, having due regard to the obligations of the Sixth-avenue Railroad Company to the city, and therefore designed to decrease the expense of a local improvement, was a legal irregularity within the meaning or spirit of the act of 1858, and fatal

Matter of McCormack.

to the assessment. The summary proceedings established by that act are for the party aggrieved by the legal irregularity (§ 1), and the petitioners were not aggrieved by the omission stated. It had the effect, on the contrary, to lessen the expense of the improvement, as already suggested. It is my opinion, therefore, that it was not only not a legal irregularity, within the meaning or spirit of the act of 1858, but a proper recognition by the Croton aqueduct board, acting on behalf of the city, of the undertaking by the Sixth-avenue Railroad Company, to keep the space within their rails in repair.

3. The objection that the pavement selected by the common council was patented, and not, therefore, open to competition, is equally unavailable. The decision in the Matter of Astor, made by the general term of this district, authorizing the receipt of proposals to pave with the Nicolson pavement, is substantially a declaration that the common council may select it if they think proper.

4. The objection to the charge for collection is well taken, if such charge exceed the two and a half per cent. allowed by law (Matter of Lewis, *supra*). It is not fatal to the assessment, however. The excess may be deducted, as provided by the act of 1870 (*supra*), and in the manner therein declared. These are all the objections I am called upon to examine.

The point made in reference to the principle on which the assessment was made, is not justified by the evidence. The proofs do not show the rule by which they were guided; but were it otherwise, I am of the opinion that the acts of the assessors, while in the lawful discharge of their duty, cannot be reviewed by proceedings under the law of 1858, although they were governed in their deliberations by an erroneous principle. Such error would not, in my judgment, constitute a legal irregularity within the meaning of that

Elwood *v.* Gardner.

law. It may also be said to be doubtful whether their acts could be reviewed at all, unless objections were taken and duly presented to the board of revision and correction. It is not necessary for me, however, to consider this point further.

I have thus disposed of all the questions arising upon the proofs herein. I entertained, at first, some doubt whether the expense for cross-walks was, under the provisions of the act of 1870 (*supra*), an unlawful increase of the expense of the improvement, but upon reflection determined that it was fairly within the spirit of the law; that the improvement having been made, and, as to the Nicolson pavement, properly made, the expense thereof should not, for the irregularity referred to, be thrown upon the city, and that to avoid that result in such cases, the act of 1870 was passed.

The effect of these conclusions is, that the assessments mentioned in the petitions herein shall not be declared void, but that there shall be deducted from them the objectionable items mentioned.

Ordered accordingly.

ELWOOD *against* GARDNER.

Court of Appeals,
Again, May, 1871.

ARREST.—PLEADING.—MOTION TO SET ASIDE EXECUTION.

Facts extrinsic to the cause of action, which are relied on as a ground of arrest, should not be alleged in the complaint.

Where the cause of action and the facts on which an order of arrest

Elwood *v.* Gardner.

is granted are identical, the defendant need not move before trial to set aside the order of arrest, but may at the trial contest the facts relied on as a ground of arrest, and if they are not proved at the trial, an execution against the person cannot be issued.*

* This important case settles the practice in regard to pleading grounds of arrest, and the right to move for a discharge from arrest after judgment. The following summary of the previous cases illustrates the principles laid down by the chief judge in delivering the opinion of the court, and indicates the practice on collateral points:

Before the amendment of 1858, section 204 of the Code provided that a defendant arrested might, at any time *before justification of bail*, apply, on motion, to vacate the order or reduce the bail.

Under that provision it was held, that though the motion could not be made after justification, the mere inactivity of allowing the time to expire for the opposite party to except to bail, without the defendant's moving in the mean time, did not preclude the motion; the waiver must be by some act of the party waiving, or by a very long acquiescence. *Supreme Ct.*, 1850, *Barber v. Hubbard*, 3 *Code R.*, 169; *Sp. T.*, 1855, *Cady v. Edmonds*, 12 *How. Pr.*, 197; and see *Wilmerding v. Moon*, 1 *Duer*, 645; *Overill v. Durkee*, 2 *Abb. Pr.*, 383.

But the contrary was held in *N. Y. Com. Pl. Sp. T.*, 1851, *Barker v. Dillon*, 1 *Code R. N. S.*, 206; *S. C.*, 9 *N. Y. Leg. Obs.*, 95; *Supreme Ct.*, 1856, *Gaffney v. Burton*, 12 *How. Pr.*, 516; and in *N. Y. Superior Ct.*, 1851, *Lewis v. Truesdell*, 3 *Sandf.*, 706; *S. C.*, 1 *Code R. N. S.*, 106.

And it was held, that a defendant, by giving bail, or procuring an undertaking to be given, did not waive his objections to the legality of the arrest, unless he did so voluntarily. And, it seems, that obtaining time to answer was not a waiver. *Supreme Ct.*, 1853, *Col. Ins. Co. v. Force*, 8 *How. Pr.*, 353.

And that where bail were not excepted to, a motion to vacate was in time, if brought on to argument, before the judge by whom the bail were examined had indorsed his allowance of them upon the undertaking, and caused it to be filed. *N. Y. Superior Ct. Sp. T.*, 1856, *Overill v. Durkee*, 2 *Abb. Pr.*, 383; *S. C.*, *sub nom. O'Neil v. Durkee*, 12 *How. Pr.*, 94.

An order of arrest founded on extrinsic facts, might be vacated on a proper application, at any time before defendant, if not bailed, had been charged in execution, even though it be after judgment. *N. Y. Superior Ct.*, *Chambers*, 1852, *Wilmerding v. Moon*, 1 *Duer*, 645; *S. C.*, 8 *How. Pr.*, 213; and see *Bridgewater Paint Co. v. Messmore*, 15 *Id.*, 12.

Elwood *v.* Gardner.

Where the summons is for relief, and the complaint alleges a contract to pay money, and fraud on defendant's part in making the contract, and demands judgment for damages sustained by reason of the fraud, in a sum beyond the face of the contract, the action is to

After defendant had given bail, and answered, he could not move to vacate the order of arrest. [1 B. & P., 132; 1 East, 81; 1 J. C., 393; 3 Sandf., 706.] *N. Y. Com. Pl.*, 1853, McKenzie *v.* Hackstaff, 2 *E. D. Smith*, 75.

Putting in bail and their justification, without objection, was a waiver of motion to vacate on the ground of insufficiency of plaintiff's affidavit, in the absence of fraud. *Supreme Ct.*, 1853, Stewart *v.* Howard, 15 *Barb.*, 26.

It is only while plaintiff allowed defendant to be at large, in custody of his bail only, that defendant (if his bail justified) could not move to be discharged; but as soon as the bail ceased to be liable as such,—*e. g.*, where plaintiff charged defendant in execution,—then defendant's right to move was restored. *Supreme Ct. Sp. T.*, 1854, Moore *v.* Calvert, 9 *How. Pr.*, 474.

Voluntarily giving security, on which defendant was discharged from arrest, was held a waiver of the right to move to vacate the order, though there was no justification, the security being accepted by plaintiffs. *Supreme Ct. I. Dist.*, 1857, Dale *v.* Radcliffe, 25 *Barb.*, 333; S. C., 15 *How. Pr.*, 71. But compare Knickerbocker Life Ins. Co. *v.* Ecclesine, 6 *Abb. Pr. N. S.*, 9.

Present rule. A defendant arrested may, at any time before judgment, move to vacate the order or reduce the bail. *Code of Pro.*, § 204, amended by the *Laws of 1858*, ch. 226. The amendment substituted the word "judgment" for "justification of bail."

Where defendant is arrested in a case not authorized, it is understood that the remedy is not under the provision as to the exoneration of bail, but only by motion under § 204. *Holbrook v. Homer*, 6 *How. Pr.*, 86.

Under section 204, as amended, the motion to vacate may be made at any time before judgment, and notwithstanding the defendant has given and perfected bail. *Supreme Ct. Sp. T.*, 1861, Wickes *v.* Harmon, 12 *Abb. Pr.*, 476; Warren *v.* Wendell, 13 *Abb. Pr.*, 187.

A defendant arrested does not, by giving bail, preclude himself from questioning the sufficiency of the plaintiff's complaint, or original affidavits, made to obtain the order. *N. Y. Superior Ct. Sp. T.*, 1869, Knickerbocker Life Ins. Co., *v.* Ecclesine, 6 *Abb. Pr. N. S.*, 9.

That section is obligatory, not merely permissive; the motion cannot be made after entry of judgment. *Supreme Ct.*, 1862, Barker

Elwood *v.* Gardner.

be deemed as sounding in tort and not in contract, and the averment of the contract is to be deemed matter of inducement merely.

In such case defendant is not bound to move, before trial, to vacate an

v. Wheeler, 14 *Abb. Pr.*, 170; and see Crowell *v.* Brown, 17 *How. Pr.*, 68; Roberts *v.* Carter, *Id.*, 479. But may, if the judgment is opened and allowed to stand only as security. Mott *v.* Union Bank, 4 *Abb. Pr. N. S.* 270.

After judgment, and defendant has been arrested and imprisoned on an execution against his person, awarded by the judgment, he cannot move to set aside the order of arrest which was issued as a provisional remedy in the action. *Supreme Ct.*, 1859, Union Bank *v.* Mott, 9 *Abb. Pr.*, 106; affirming 8 *Id.*, 150, and 16 *How. Pr.*, 525.

A motion to vacate an order of arrest may be made *at any time before judgment, or it may be made after judgment if made within twenty days after service of the order of arrest.* The amendment to section 183 of the Code, adopted in 1862, did not abrogate the provision of section 204, allowing the motion any time before judgment. *Supreme Ct. Sp. T.*, 1868, Pelo *v.* Clukey, 36 *How. Pr.*, 179.

Section 204 requires a motion to the court, and upon due notice. *Supreme Ct.*, 1860, Rogers *v.* McElhone, 12 *Abb. Pr.*, 292; S. C., 20 *How. Pr.*, 441.

The motion to vacate need not necessarily be made before the judge who granted the order. *Supreme Ct. Chambers* (1849 ?), Dunaher *v.* Meyer, 1 *Code R.*, 87.

The exercise of discretion in granting the order, by the judge to whom application for an order of arrest is made, may be reviewed by another judge at special term, upon a motion to vacate the order. *N. Y. Superior Ct. Sp. T.*, 1869, Knickerbocker Life Ins. Co. *v.* Ecclesine, 6 *Abb. Pr. N. S.*, 9.

Where the complaint in an action on contract set forth a fraud in contracting the debt, and defendants, in their answer, took issue directly on the question of fraud, and the court, upon the trial, expressly found that there was not fraud; and plaintiffs had, at the commencement of the action, procured, upon affidavits, an order of arrest, and this order defendants now moved to set aside, on affidavits, and on the finding of the court,—*Held*, that the issue, as to fraud, raised by the pleadings, was material; and the finding thereon, so long as not appealed from, was conclusive against plaintiff's right to arrest defendants. *Supreme Ct. Sp. T.*, 1861, Warren *v.* Wendell, 13 *Abb. Pr.*, 187.

Supersedeas. It was formerly held that an application for a *supersedeas* could not be granted under 2 Rev. Stat., 556, § 37, on the ground

Elwood *v.* Gardner.

order of arrest; and plaintiff cannot, by abandoning at the trial his averment of fraud, and obtaining judgment on proof of the contract alone, preclude the defendant from subsequently moving to set aside execution issued thereon against the person.

that plaintiff had neglected for three months to charge defendant in execution, unless the bail had been exonerated. And that when the moving papers, on an application for a *supersedeas* in such case, do not show that the bail have been exonerated, plaintiff's allegation that no notice of surrender was ever given to him, was, in effect, a denial that defendant had been exonerated. *Hills v. Lewis*, 13 *Abb. Pr.*, 101, note. The time is computed from *actual* entry of judgment. *Lippman v. Petersberger*, 9 *Abb. Pr.*, 209; *S. C.*, 18 *How. Pr.*, 270.

And on a motion to discharge the defendant from imprisonment, for the neglect of the plaintiffs to charge him in execution within three months after having been surrendered by his bail, the plaintiff's ignorance that he had been surrendered is sufficient "good cause to the contrary," in opposition to the application; but plaintiff may be required to issue execution within a reasonable time, or submit to *supersedeas*. *N. Y. Superior Ct. Sp. T.*, 1865, *Desisles v. Cline*, 4 *Robt.*, 645.

Where a defendant is in close custody at the time of entering up judgment against him, but is admitted to the jail liberties within three months thereafter, and is again surrendered into close custody by his bondsmen, he is not entitled to be discharged from custody upon the ground of the failure of the plaintiff to charge him in execution (2 *Rev. Stat.*, 556, § 38), until three months after his surrender. *N. Y. Superior Ct. Sp. T.*, 1866, *Booth v. Barnes*, 5 *Robt.*, 640.

If a defendant, arrested in a civil action, is prejudiced by the delay of the plaintiffs to enter judgment and charge him in execution, he should move to compel them to do so, and cannot charge the plaintiffs with *laches* unless he has so moved. *Supreme Ct.*, 1867, *Carter v. Loomis*, 2 *Abb. Pr. N. S.*, 295.

Where, however, the plaintiffs have been guilty of gross negligence in this respect, they may be required to stipulate to waive any objections to his taking the benefit of the fourteen day act, and the defendant be allowed to be discharged under that act on giving the usual notice. *Ib.*

Where plaintiff had defendant arrested at the commencement of suit, and, after judgment, allowed him to remain in custody more than two years, under the original order, and without issuing execution,—*Held*, that this course was in fraud of the law, and defendant was entitled to an order of *supersedeas*. *Supreme Ct.*, 1855, *Wells v. Jones*, 2 *Abb. Pr.*, 20.

Elwood *v.* Gardner.

Appeal from an order refusing to set aside an execution.

This action was brought by John B. Elwood against George S. Gardner.

By a clause added to section 288 of the Code in 1870, it is provided, that "If any defendant be in actual custody under an order of arrest, and the plaintiff shall neglect to enter judgment in the action within one month after it is in his power to do so, or shall neglect to issue execution against the person of such defendant, within three months after the entry of judgment, such defendant may, on his motion, be discharged from custody by the court in which such action shall have been commenced, unless good cause to the contrary be shown; and after being so discharged, such defendant shall not be arrested upon any execution issued in such action." *Code of Pro.*, § 288, last clause, added by *Laws of 1870*, ch. 741, § 11.

Motion on original papers. Where an order of arrest is granted on plaintiff's affidavit alone, and a discharge is moved for on plaintiff's papers alone, his affidavit, being uncontradicted, is to be taken as true; but it is to be strictly construed against him. *Supreme Ct. Sp. T.*, 1857, *Hathorn v. Hall*, 4 *Abb. Pr.*, 227.

On motion to vacate an order of arrest, made upon the original papers only, if the necessary facts are positively sworn to in the plaintiff's affidavit, and if deponent can have had knowledge of them, the court will not vacate the order on the ground that the statements which it contains were probably not within his knowledge. *N. Y. Com. Pl. Sp. T.*, 1866, *Ballouhey v. Cadot*, 3 *Abb. Pr. N. S.*, 122.

New affidavits—in what cases receivable. If the notice of motion points only to defects in plaintiff's affidavit, new affidavits on both sides are to be excluded. *Supreme Ct. Sp. T.*, 1848, *Adams v. Mills*, 3 *How. Pr.*, 219.

Denial. Even in an action on contract, defendant may, on a motion to discharge an order of arrest, introduce affidavits denying the case made by plaintiff's affidavits. *Supreme Ct.*, 1850, *Barber v. Hubbard*, 3 *Code R.*, 169.

Although an order of arrest ought not to be granted upon general assertions made on information only, yet if, on a motion to discharge from arrest, such allegations are not met by a denial, they will be taken to be true. *N. Y. Superior Ct. Sp. T.*, 1866, *Wolfe v. Brouwer*, 5 *Robt.*, 601.

Denying plaintiff's cause of action, or impeaching his affidavit, by

Elwood *v.* Gardner.

The complaint was as follows :

The plaintiff complains of the defendant, and alleges that on or about February 2, 1869, at the city of New York, he, the said plaintiff, purchased of the said

showing that he swore differently on another occasion, is not enough. *Supreme Ct. Sp. T.*, 1848, *Martin v. Vanderlip*, 3 *How. Pr.*, 265.

When the statement of the defendant, corroborated by the testimony of another witness, is diametrically opposed to that of the plaintiff, it is not a proper case for an order of arrest. *N. Y. Superior Ct.*, 1865, *Mulry v. Collett*, 3 *Robt.*, 717.

If plaintiff's affidavit explicitly alleges the fraud, which defendant's affidavit as explicitly denies, the latter should be regarded as neutralizing the former, and plaintiff should be left to make out his case by further proofs. *Supreme Ct.*, 1860, *Allen v. McCrassen*, 32 *Barb.*, 662; see, also, *Mecklin v. Berry*, 23 *How. Pr.*, 380.

Cause of action not tried. Where the right to arrest the defendant is derived from the nature of the action—*e. g.*, if the action is to recover moneys received in a fiduciary capacity—defendant will not be allowed, on motion to discharge from arrest, to introduce affidavits to show that there is no cause of action. *N. Y. Com. Pl. Sp. T.*, 1857, *Geller v. Seixas*, 4 *Abb. Pr.*, 103.

Where the arrest is grounded on the nature of the cause of action, and plaintiff's affidavit shows a cause of action with clearness and precision, defendant should not be discharged merely because he denies plaintiff's averments. [1 *Bosw.*, 634.] *N. Y. Superior Ct.*, 1859, *Cousland v. Davis*, 4 *Bosw.*, 619. *N. Y. Com. Pl.*, 1858 [citing 4 *Abb. Pr.*, 103], *Solomon v. Waas*, 2 *Hilt.*, 179; *Anonymous*, 6 *Abb. Pr.*, 319, note; compare *Swift v. Wylie*, 5 *Robt.*, 680.

At least, unless there is a very decided preponderance of evidence of the defendant upon the motion, or unless the facts show clearly plaintiff has no cause of action. The questions brought before the court on the motion being issues in the cause, the jury alone, except in the instances mentioned, should pass upon them at the trial. [14 *How. Pr.*, 131; 47 *Barb.*, 629.] *Supreme Ct.*, 1867, *Merritt v. Heckscher*, 50 *Barb.*, 451; *N. Y. Com. Pl. Sp. T.*, 1868, *Royal Ins. Co. v. Noble*, 5 *Abb. Pr. N. S.*, 54; *N. Y. Superior Ct.*, 1865, *Merwin v. Playford*, 3 *Robt.*, 702; *Chittenden v. Hubbell*, 6 *Abb. Pr.*, 319, note.

Thus, on motion to discharge from arrest in an action for malicious prosecution, it is sufficient if plaintiff shows *prima facie* a sufficient cause,—*e. g.*, an immediate dismissal by the magistrate, of the prosecution. *Supreme Ct. Sp. T.*, 1860, *Gould v. Sherman*, 10 *Abb. Pr.*, 411.

Elwood *v.* Gardner.

defendant, at the instance and request of said defendant, a certain promissory note of the amount of one thousand dollars, made by Ephraim Steele and John D. Voorhees, in their firm name of Steele & Voorhees,

Where the arrest is grounded on the nature of the cause of action, the order will not be set aside upon the merits, unless defendant clearly makes out such a case as would call on the judge at the trial either to nonsuit plaintiff, or to direct a verdict for defendant. *Supreme Ct.*, 1862, *Levins v. Noble*, 15 *Abb. Pr.*, 475. To the same effect [citing 14 *How. Pr.*, 131; and disapproving 11 *Id.*, 1; and 4 *Duer*, 643], *Sp. T.*, 1861, *Barret v. Gracie*, 34 *Barb.*, 20. *N. Y. Com. Pl. Sp. T.*, 1867, *Stuyvesant v. Bowran*, 3 *Abb. Pr. N. S.*, 270; 34 *How. Pr.*, 51.

It is no reason for dispensing with this rule that the calendar is so crowded that the case may not be reached for a trial on the merits for a long time; and that, meanwhile, the defendant, being unable to procure bail, is imprisoned. In such a case, the court of common pleas will advance the cause upon the calendar, so as to give an early trial. *N. Y. Com. Pl. Sp. T.*, 1868, *Royal Ins. Co. v. Noble*, 5 *Abb. Pr. N. S.*, 54.

Upon motion to discharge an arrest, the court will permit a partial trial of the cause. The order should be vacated, if the plaintiff fails to make out his cause of action and arrest. *N. Y. Superior Ct. Sp. T.*, 1855, *Hernandez v. Carnobeli*, 10 *How. Pr.*, 433; *S. C.*, 4 *Duer*, 642. Disapproved in *Barret v. Gracie*, 34 *Barb.*, 20.

If defendant admits the false representation, his denial of intent to defraud is immaterial. *Supreme Ct. Sp. T.*, 1858, *Whitcomb v. Salsman*, 16 *How. Pr.*, 533.

Where defendant is arrested on the ground that the money sued for was received by him in a fiduciary capacity, and in the opinion of the court, the facts shown by plaintiff, and not denied by defendant, show that the fund was so received by him, he cannot be discharged on motion without showing to the entire conviction of the court that he has a valid defense. Only the clearest proof that plaintiffs cannot recover any part of the sum, would justify the discharge. *N. Y. Superior Ct.*, 1856, *Republic of Mexico v. Arangoiz*, 5 *Duer*, 634; *aff'g* 11 *How. Pr.*, 1; compare *Barret v. Gracie*, 34 *Barb.*, 20.

It seems, that matters merely in reduction of the amount of indebtedness, are not to be considered on motion to vacate. *Noble v. Prescott*, 4 *E. D. Smith*, 139.

In an action brought to recover the value of chattels of the plaintiff, converted by a defendant, it is not ground for discharging an order of

Elwood *v.* Gardner.

they then composing a firm of that name, doing business at corner of Court and Sackett-streets, in the city of Brooklyn, dated December 18, 1868, payable to the order of themselves, nine months after said date, at the

arrest that the defendant has a claim for a larger amount against a plaintiff. *Supreme Ct. Sp. T.*, 1865, *Huelet v. Re却ns*, 1 *Abb. Pr. N. S.*, 27.

After a trial by the court, and a decision directing judgment for money, on the ground that it was received in a fiduciary capacity, the court refused to vacate an order of arrest which had been granted on the same ground. *Chaino v. Coffin*, 17 *Abb. Pr.*, 441.

Summons. On motion after answer, order of arrest should not be set aside for irregularity in the summons. *N. Y. Superior Ct. Sp. T.*, 1857, *Bedell v. Sturta*, 1 *Bosw.*, 634; *S. C.*, 6 *Abb. Pr.*, 319, note. Compare *Swift v. Wylie*, 5 *Robt.*, 680.

The fact that the summons has been amended, changing it from a summons for a money demand to a summons for specific relief, does not impair the effect of a previous order of arrest, nor afford ground for vacating the order. *Supreme Ct. Sp. T.*, 1858, *Union Bank v. Mott*, 6 *Abb. Pr.*, 315.

Complaint, when referred to. Where the summons and complaint have been served, and were before the judge upon an application for an order of arrest, based on affidavit, the plaintiff is entitled to refer to the complaint, if verified, in support of the order, where the affidavit proves defective. *N. Y. Superior Ct. Sp. T.*, 1854, *Brady v. Bissell*, 1 *Abb. Pr.*, 76; *Supreme Ct. Sp. T.*, 1856, *Turner v. Thompson*, 2 *Id.*, 444. To the contrary was *Smith v. Edmonds*, 1 *Code R.*, 86.

Where the ground of arrest is extrinsic to the cause of action,—*e. g.*, in an action to recover a debt fraudulently contracted,—the order is to be sustained by the affidavits alone. It is no ground for vacating it, that the complaint does not allege the fraud. [13 *How. Pr.*, 230; 6 *N. Y. (2 Seld.)*, 560.] *Supreme Ct. Sp. T.*, 1860, *Muklan v. Doty*, 20 *How. Pr.*, 236.

Effect of variance. On motion to vacate an order of arrest, founded on the nature of the cause of action, if there is any ambiguity as to its nature, the determination must be governed by ascertaining not what cause of action the plaintiff has intended to set forth, but rather what cause of action he must rely upon for a recovery. *Supreme Ct.*, 1858, *Peel v. Elliott*, 7 *Abb. Pr.*, 433; *S. C.*, 28 *Barb.*, 200; *S. C.*, 16 *How. Pr.*, 485.

It is not a ground for vacating an order of arrest, that the case

Elwood *v.* Gardner.

Atlantic National Bank, and by them indorsed. That at and prior to the purchase thereof, and as inducement thereto, the said defendant represented and stated that the makers of said note were perfectly good and re-

made by the complaint varies from that made by the affidavits, if the affidavits are themselves sufficient, and disclose a ground of arrest consistent with the allegations of the complaint. *N. Y. Superior Ct. Sp. T.*, 1858, *Stelle v. Palmer*, 7 *Abb. Pr.*, 181.

Supplementary affidavits. If the motion be made on affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made. *Code of Pro.*, § 205.

Plaintiff cannot introduce supplementary affidavits to *supply defects* in the affidavit on which the order of arrest was granted, but only to oppose defendant's new affidavits. *Supreme Ct. Sp. T.*, 1848, *Martin v. Vanderlip*, 3 *How. Pr.*, 265.

Plaintiff's affidavit must establish the particular fraud relied upon as the foundation of the order. He cannot, under section 205 of the Code, on a motion to vacate, set up a ground for retaining it not put forth as the original ground of the order. *Supreme Ct. Sp. T.*, 1855, *Cady v. Edmonds*, 12 *How. Pr.*, 197.

Evidence of other concurrent frauds committed by the defendant is admissible on a motion to vacate an order of arrest, as proof of the intent in committing the particular fraud charged. [18 N. Y., 588.] *Supreme Ct.*, 1860, *Ballard v. Fuller*, 32 *Barb.*, 68. To the same effect, *Chambers*, 1861, *Scott v. Williams*, 14 *Abb. Pr.*, 70; *S. C.*, 23 *How. Pr.*, 393.

How determined. Where the fraud depends on specific facts, which are denied in the affidavits on which the motion to discharge the order of arrest is made, the court will look into and weigh affidavits on both sides, and decide upon the truth of the facts. *N. Y. Superior Ct.*, 1851, *Falconer v. Elias*, 3 *Sandy.*, 731.

Upon a motion to vacate an order of arrest, obtained under the Code, the question is, whether upon the whole case, as made by the affidavits on both sides, the court, if called on to act upon the application as *res nova*, would grant the order of arrest. If not, it should be vacated; otherwise, it should stand. [10 *How. Pr.*, 449; 11 *Id.*, 9; 12 *Id.*, 197.] *Supreme Ct. Sp. T.*, 1856, *Chapin v. Seeley*, 13 *How. Pr.*, 490; 1858, *Union Bank v. Mott*, 6 *Abb. Pr.*, 315; 1860, *Allen v. McCrasen* 32 *Barb.*, 662. But see *Frost v. McCarger*, 14 *How. Pr.*, 131; and *Barron v. Sanford*, 6 *Abb. Pr.*, 320, note; *S. C.*, 14 *How. Pr.*, 448,

Elwood *v.* Gardner.

sponsible, and that said note would beyond all doubt be paid at maturity; that said makers were prompt and punctual men of the best of credit, and carried on the largest, or one of the largest, and most favorably

where this rule is limited to cases in which the ground of arrest is extrinsic to the cause of action.

If it appear from the affidavit on which the order of arrest was granted, that the action was for damages for an injury to the person of the plaintiff, it is sufficient to give the judge jurisdiction; and it is a matter of discretion whether the order should be allowed, the exercise of which is not reviewable on motion to vacate it. *Supreme Ct. Sp. T.*, 1854, *Lapeous v. Hart*, 9 *How. Pr.*, 541. To the contrary see *Knickerbocker Ins. Co. v. Ecclesine*, 6 *Abb. Pr. N. S.*, 9.

An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party. *N. Y. Superior Ct. Sp. T.*, 1860, *Webber v. Moritz*, 11 *Abb. Pr.*, 113.

Nor on the ground that defendant is exempt by virtue of his office. Plaintiff is entitled to retain his order, with a view of making the arrest when the exemption expires. *Hart v. Kennedy*, 39 *Barb.*, 186; S. C., 15 *Abb. Pr.*, 290; 24 *How. Pr.*, 425; reversing 14 *Abb. Pr.*, 432; S. C., 23 *How. Pr.*, 417.

Nor on the ground that an action has been brought in a foreign court against the defendant for the same cause, it not appearing that any arrest was ever made there, or would have been allowed by the practice of such court. *Supreme Ct. Sp. T.*, 1860, *Arthurton v. Dalley*, 20 *How. Pr.*, 311.

So also a motion to vacate order of arrest was denied, though it was admitted that an attachment proceeding between the parties, and for the same cause of action, was pending, and a small amount of property garnisheed, in Arkansas. *Supreme Ct.*, 1851, *Lithaner v. Turner*, 1 *Code R. N. S.*, 210.

An order of arrest founded on a complaint containing several counts or causes of action, on some of which defendant is not liable to arrest, should be vacated. [1 *Hill*, 225; 7 *Id.*, 182; 2 *N. Y.*, 262; 17 *How. Pr.*, 517.] *Supreme Ct.*, 1859, *McGovern v. Payn*, 32 *Barb.*, 83. Compare *Shipman v. Shafer*, 14 *Abb. Pr.*, 449; *Ely v. Steigler*, 9 *Abb. Pr. N. S.*, 35; *Redfield v. Frear*, *Id.*, 449.

Vacating on condition. Where on the whole case, as presented upon the motion to vacate, there is not evidence to charge defendant with the wrong complained of, but plaintiff appears to have had probable cause and no malice in making the arrest,—the discharge may be

Elwood *v.* Gardner.

known grocery establishments in Brooklyn, and that in addition to the capital they had in their store, the said Steele had also large amounts outside invested in real estate ; that as a still further inducement to said purchase, the said defendant stated that he also would indorse said note, which would make the same doubly good ; that he was the owner of several pieces of real estate in Brooklyn of great value, and also held mortgages and notes of various amounts, several of which were enumerated by said defendant.

And the plaintiff further says, that he relied upon said representations so made by said defendant and believed them to be true, and upon the strength and by reason of them alone, he did, upon said defendant indorsing said note, which he then and there did, take from him said note and pay him therefor.

And the said plaintiff further says, that on said note becoming due, it was duly presented for payment at said bank and payment thereof demanded of the makers, but the same was not paid, and that the same was thereupon duly protested and notice of such non-payment and notice was given to said defendant, the expense of which was one dollar and twenty-four cents, and that said note and the whole thereof still remains due and unpaid.

granted conditionally upon defendant's stipulating not to bring an action for the arrest. *Supreme Ct. Sp. T.*, 1856, Northern Railw. Co. of France *v.* Carpentier, 4 *Abb. Pr.*, 47.

On an appeal from an order discharging defendant from arrest on the ground of the insufficiency of the affidavit, the court being of opinion that he was entitled to discharge, but that he ought to stipulate to bring no action for the arrest, affirmed the order on condition that he stipulate. *N. Y. Com. Pl.*, Brophy *v.* Rodgers, 7 *N. Y. Leg. Obs.*, 152.

In an action in which a receiver had been appointed, the court granted a motion to discharge defendant from imprisonment, conditionally upon his delivering to the receiver the property to recover which the suit was brought. Glenton *v.* Clover, 10 *Abb. Pr.*, 422.

Elwood *v.* Gardner.

And the said plaintiff further says that said representations so made by said defendant on the sale of said note were false and fraudulent and in every respect untrue, and so known to be by said defendant at the time of making the same, and were made with a view and intent to cheat and defraud and obtain possession of the money so given for said note, without returning any equivalent therefor. That the said Steele & Voorhees were not at said time good and responsible, but worthless, and in a very short time thereafter failed in business and closed their store at their said place of business aforesaid. That the said defendant did not at said time as by him represented, own real estate, but all so claimed to be held and owned by him was in the name of his wife instead of his own, in whose name it is still held ; that he did not at said time, as said plaintiff is informed and believes, own said mortgages and notes so represented by him to be held and owned, and that whatever personal property was by him held has, in continuation and furtherance of his said fraudulent design, been transferred to his son, in whose name business is now carried on instead of defendant's. That execution, not only against the said Steele & Voorhees, but also against the said defendant, have been issued to the sheriff of the said county of Kings, and which, as plaintiff is informed by said sheriff and believes to be true, are wholly uncollectable, and some of which have been returned wholly unsatisfied, and that both said Steele & Voorhees, as also said defendant, are now, as plaintiff is informed and believes, worthless and irresponsible ; and that said debt cannot be collected of them or either of them by executions against their property or by the ordinary process of collecting debts.

And the said plaintiff further says that by reason of false and fraudulent conduct, acts and representations, on the part of said defendant, he, said plaintiff, has sustained damage to the amount of said note and

Elwood *v.* Gardner.

interest thereon and costs of protest, and also of the costs, charges and expenses incurred in endeavoring to collect the same of said Steele & Voorhees to the amount of fifty dollars, making in all the sum of one thousand and fifty-one dollars twenty-four cents and interest.

He therefore brings suit and demands judgment against said defendant for the sum of one thousand and fifty-one dollars and twenty-four cents, with interest on one thousand dollars thereof from September 21, 1869, together with one dollar and twenty-four cents costs of protest, besides the costs of this action.

[*Verification.*.]

[*Signature.*.]

An order of arrest was granted on the following affidavit, which, together with the complaint, is given here in full, as the decision of the appeal turns upon the nature of the cause of action as set forth, and its identity with the grounds of arrest.

City and County of New York, ss.

John B. Elwood, of said city, being duly sworn, deposes and says, that he is the plaintiff in the above-entitled action, and that he has a good and sufficient cause of action against said defendant arising upon the following facts, *viz*: That on or about February 2, 1869, at the said city of New York, he, the said plaintiff, at the instance and request of said defendant, purchased of him, the said defendant, a certain promissory note of the amount of one thousand dollars, made by Ephraim Steele & John D. Voorhees, in the firm name of Steele & Voorhees, they then composing a firm of that name, doing business at corner of Court and Sackett-streets, in the city of Brooklyn, dated December 18, 1868, payable to the order of themselves nine months after said date, at the Atlantic National Bank, and by them indorsed. That at and prior to the time of said purchase, and as inducement thereto, the said defendant represented and stated that the makers of said note were abundantly good, and that the same

Elwood *v.* Gardner.

would beyond all question be met at maturity ; that no more prompt and punctual men were to be found in the city of Brooklyn or New York than they ; that the said Steele's standing in Brooklyn was the very best, and that he was regarded amongst the heaviest men in said city, and that his standing there was the same or as good as A. T. Stewart's in the city of New York. That said firm was the heaviest dealers in groceries in Brooklyn, and that moreover said Steele was the owner of large quantities of real estate. That he knew of a recent transaction in real estate in which he, Steele, had paid twelve thousand dollars in cash, and in addition had taken a mortgage of seven thousand dollars on another place that he had sold.

As a further inducement to said plaintiff to purchase said note, said defendant also stated that he himself would also indorse said note ; that the same would then be doubly good. That he was perfectly responsible, that he was just then embarrassed by reason of some transactions in which he was engaged, but that he was abundantly good, and was the owner of several pieces of real estate in Brooklyn, and also held several mortgages on real estate, one of one thousand dollars and one of three thousand dollars, and several others of a smaller amount, together with several promissory notes, ranging in amount from three hundred dollars upwards.

And deponent further says, that he relied upon said representations and statements so made by said defendant, and believed them to be true, and upon the strength and by reason of them alone, he did upon defendant's indorsing said note, which he then and there did, take from him said note, and pay him therefor.

And this deponent further says, that on said note becoming due, it was duly presented for payment at said bank and payment thereof demanded of the makers, but the same was not paid but protested, and that

Elwood *v.* Gardner.

due notice of such non-payment and protest was given to said defendant, the expense of which was one dollar and twenty-four cents, and that said note and the whole thereof still remains due and unpaid.

And this deponent further says, that said representations so made by said defendant on the sale of said note were false and fraudulent and in every respect untrue, and so known to be by said defendant at the time of making the same, and were made with a view to cheat and defraud and obtain possession of the money so given for said note without returning any equivalent therefor. That the said Steele & Voorhees were not at said time good and responsible, but worthless, and in a very short time thereafter failed and closed their store at their said place of business. That the said defendant did not at said time, as by him represented, own real estate, but all so claimed to be held and owned by him was in the name of his wife instead of his own, in whose name it is still held ; nor did he own as this deponent is informed and believes said mortgages and notes so represented by him to be held and owned ; and that whatever personal property was by him held has, in continuation and furtherance of his said fraudulent design, been transferred to his son, and in whose name business is now carried on instead of his own. That executions not only against the said Steele & Voorhees, but also the said Gardner, been issued to the sheriff of the said county of Kings, which, as deponent is informed by said sheriff and believes to be true are wholly uncollectable, and some of which have been returned wholly unsatisfied, and that both said Steele & Voorhees as also Gardner are now, as deponent is informed and believes, utterly worthless and irresponsible, and that said debt cannot be collected of them or either of them by execution against their property or by the ordinary process of collecting debts.

And the said deponent further says, that by reason

Elwood *v.* Gardner.

of such false and fraudulent conduct, acts and representations on the part of said Gardner, he, the said deponent, has sustained damage to the amount of said note and interest thereon and costs of protest, and also of the costs, charges and expenses incurred in endeavoring to collect the same of said Steele & Voorhees to the amount of fifty dollars, making in all the sum of one thousand and fifty-one dollars and twenty-four cents and interest. That he is about to commence an action in the supreme court to recover said damages, and asks that an order of arrest herein be granted against the person of said defendant.

[*Jurat.*]

[*Signature.*]

The answer alleged that defendant, being indebted to the plaintiff in a little more than three hundred dollars, obtained an additional loan of enough to make the sum one thousand dollars, less the sum of one hundred and fifty dollars, usurious interest, and delivered the note sued on, to the plaintiff as security ; and demanded judgment that the complaint be dismissed, and plaintiff be adjudged to deliver up the note described in the complaint.

On the trial, the plaintiff proved the note and computed the amount of interest, and recovered by direction of the court, a verdict for principal and interest, one thousand and thirty-five dollars and twenty-two cents, with costs and disbursements.

A motion of defendant's counsel to dismiss the complaint, and for a verdict in favor of defendant, was denied.

From this judgment the defendant appealed to the court at general term, on the ground that the fraud alleged was not proved at the trial.

The argument at general term is reported in 9 Abb. *Pr. N. S.*, 99. The judgment was affirmed.

After judgment, plaintiff issued execution against

Elwood *v.* Gardner.

property, which was returned unsatisfied ; and thereupon he issued executions against the person, for the original judgment, and for the costs of appeal.

The defendant moved to vacate the execution issued against his person, which motion was granted at special term, as reported in *9 Abb. Pr. N. S.*, 99 ; and the order having been affirmed at general term, the plaintiff appealed to this court.

John B. Elwood, for appellant, in person.—I. The motion is practically nothing more or less than a motion to vacate the order of arrest after judgment ; and the granting of it is in direct conflict with the Code, §§ 183, 204 (Barker *v.* Wheeler, *23 How. Pr.*, 193 ; Roberts *v.* Carter, *17 Id.*, 479 ; S. C., *9 Abb. Pr.*, 106).

II. The attempt to discriminate between a motion to vacate an execution under the circumstances, and an order of arrest, has no basis whatever to sustain it (Crowell *v.* Brown, *9 Abb. Pr.*, 107).

III. None of the cases are authority for vacating these executions (citing and commenting on Humphrey *v.* Brown, *17 How. Pr.*, 481 ; Pope *v.* Newcomb, *30 N. Y.*, 589 ; *7 Hill*, 182 ; Smith *v.* Knapp, *30 N. Y.* ; Corwin *v.* Freeland, *6 N. Y. [2 Seld.]*, 560-564 ; Lovee *v.* Carpenter, *3 Abb. Pr. N. S.*, 309, 310 ; Atocha *v.* Garcia, *24 How. Pr.*, 186, 189 ; Wood *v.* Henry, *40 N. Y.*, 124).

IV. On the contrary, the last three are against it, while the cases in *2 Seld.* and *30 N. Y.*, go still farther, and far beyond what is necessary for us in this case.

V. The consequence of setting aside these executions would be not only to render the plaintiff liable to false imprisonment in a case where he had been in every respect regular and guilty of no fault, but also to open the courts to numberless applications to vacate executions based upon no higher grounds than the party's or attorney's ignorance or neglect.

VI. The enforcing of the executions operates as no

Elwood *v.* Gardner.

injustice to defendant. They are only means and remedies to force him as a dishonest debtor to pay what he admits to be honestly due.

VII. The court had no power to make the order that it did, referring the matter to a referee to take the proofs. It should have been heard and determined by the judge (see opinion of Justice INGRAHAM, 1 *Abb. Pr. N. S.*, 27, 28). Had we elected to take proof under the order, it would have been a waiver of our right to appeal from it for a review of the legal questions involved in it, as having accepted a condition given under it (17 *Abb. Pr.*, 229; 4 *Id.*, 468; 18 *N. Y.*, 481; 16 *How. Pr.*, 483).

VIII. Should this order be affirmed, the right to introduce proof on the merits should still be reserved to plaintiff, and the order so modified as to restrain the defendant to the proofs now in, with the right to the plaintiff to controvert and answer them. This is asked simply as a matter of precaution, not doubting that the court will hold the law as we claim it, nor, indeed, scarcely fearing that upon the merits, as they now stand, upon the defendant's own showing, they would be found with us,—1. For the reason that the allegations in plaintiff's affidavit are not fully and squarely met and controverted,—2. Because the defendant admits that the representations charged *by the plaintiff to have been made by defendant as to the standing and responsibility of Steele & Voorhees are true*, attempting to justify himself only on the alleged ground that what he said he did not then *know* to be untrue (21 *N. Y.*, 238).

Edwin G. Davis, for the defendant, respondent.—

I. The supreme court had the power after judgment to vacate a *ca. sa.*, although an order of arrest had been issued in the case, and no motion made to set it aside (*Pope v. Newcomb*, cited in 30 *N. Y.* 589;

Elwood *v.* Gardner.

Smith *v.* Knapp, *Id.*, 581; 7 *Hill*, 182; Humphrey *v.* Brown, 17 *How. Pr.*, 481.

II. The defendant has clearly shown himself to be entitled to the benefit of the rule. It is conceded, for the purpose of this appeal, that there are no facts to justify the imprisonment of the defendant, as the plaintiff has not availed himself of the opportunity given him by the order of Justice PRATT (Discussing at length Smith *v.* Knapp and Corwin *v.* Freeland, 6 *N. Y.*, [2 *Seld.*], 565; citing, also, Wood *v.* Henry, 40 *N. Y.*, 124). Here the issue joined was clearly a question of fraud, and the defendant was prepared to meet it. The court, in allowing the plaintiff to recover, extended to him an indulgence. But it cannot be claimed that in so doing it left the defendant remediless.

BY THE COURT.—CHURCH, Ch. J.—This court, in Smith *v.* Knapp (30 *N. Y.*, 581), held that if a motion to set aside an order of arrest is not made before judgment, the defendant may be imprisoned on a *ca. sa.* issued on the judgment. But if the judgment is recovered for a cause of action for which the defendant is not liable to arrest, he may then move to set aside the *ca. sa.*, or to be discharged from imprisonment. In that case there were several causes of action set forth in the complaint, in some of which the defendant was liable to arrest, and in others not. An order of arrest had been obtained on the former, and judgment was taken for a cause of action for which the defendant was not liable to arrest. In such a case it is manifest that the court should relieve a party from imprisonment, otherwise he might be imprisoned for a cause not authorized by law, through the form of procedure.

Section 179 of the Code of Procedure authorizes the arrest of a defendant in certain *actions*, specified in the act, of a tortious character, and also in actions on contract when the defendant has been guilty of certain

Elwood *v.* Gardner.

wrongful acts affecting the cause of action or the consideration.

Subdivision 4 reads as follows: "When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation *for which the action is brought*, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought, or when *the action is brought to recover damages for fraud or deceit*."

Section 288 declares that "no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179."

An order of arrest may be obtained in both classes of cases,—in those cases where the cause of action is identical with the cause of arrest, and in the actions where facts *dehors* the cause of action constitute the ground of arrest.

In the latter class of cases, unless an order of arrest is obtained before judgment, no *ca. sa.* can issue.

This process is, in effect, prohibited by section 288, above quoted.

In such cases it is not necessary or proper to set forth the facts constituting the cause of arrest, in the complaint, because they constitute no part of the cause of action, and are not relevant to it, and need not be proved on the trial. For instance, in an action upon contract to recover a debt, it would be improper to set forth that the defendant had been guilty of fraud in contracting the debt, or that he had disposed of his property with intent to defraud his creditors. It is only proper to state in a complaint the facts necessary to the cause of action. In such a case, an order of arrest must be obtained before judgment, to entitle the plaintiff to a *ca. sa.* If obtained, and not set aside before

Elwood *v.* Gardner.

judgment, a *ca. sa.* may issue without any further order or direction of the court; and the defendant, if he seeks to avoid the effect of the order, can move to set it aside at any time before judgment; and if he omits to do so, or if he is unsuccessful in a motion to set it aside, he is concluded after judgment from questioning the binding effect of the order.

But when the *cause of action* is one which gives plaintiff a right to an order of arrest, and the facts constituting it are identical with the facts constituting the cause of arrest, the defendant can contest the right to arrest upon a preliminary motion to set aside the order, and also contest the alleged cause of action, of course, upon the trial. In such a case it follows that he is not concluded by the order, or the decision upon the motion to set it aside: he may omit to make the motion altogether, as the trial upon the facts alleged in the complaint will furnish an opportunity to contest the facts in a form preferable to that of a motion. If the trial of such an action results in favor of the plaintiff, the record is conclusive in favor of the right to issue a *ca. sa.*; and if for the defendant, the order is of course discharged.

The meaning of the latter clause of section 228,—providing that a defendant shall not be arrested unless the complaint contains a statement of facts showing one or more causes of arrest required by section 179,—is that the statement in the complaint must be of facts legitimately and properly in the complaint, such as are proper and necessary to be proved; or, in other words, such as constitute a cause of action for which a party may be arrested. It would be absurd, in an action on a promissory note, to allow a party, after judgment, to issue a *ca. sa.* without having obtained an order of arrest, merely by incorporating into the complaint a statement of facts sufficient to have authorized the order upon a motion. Such facts have no legitimate place

Elwood *v.* Gardner.

in a complaint unless they are pertinent to the cause of action, and if they are, they should be proved on the trial.

The case at bar was an action to recover damages for fraud and deceit, in obtaining money by false and fraudulent representations as to the pecuniary standing and credit of the makers of a note and the pecuniary ability of the defendant who indorsed and transferred it to the plaintiff. The complaint set forth the representations, their falsity, that the party relied upon them, and then says "that by reason of the false and fraudulent conduct, acts, and representations, on the part of the said defendant, the said plaintiff has sustained damages," to the amount of the note and interest and fifty dollars costs incurred in prosecuting the makers, and demands judgment therefor. It is true that the facts in relation to the making, indorsement, and transfer of the note are set forth, but these are stated by way of inducement, and for the purpose of showing the occasion and materiality of the representations (*Townsend v. Hendricks*, 40 *How. Pr.*, 143).

There is no claim to recover upon the note or against the defendant as indorser. On the contrary, it is claimed to recover fifty dollars more than the plaintiff would be entitled to against the defendant as indorser, and expressly for fraud.

All the allegations of fraud in the complaint were improper, unless they constituted a cause of action for fraud and deceit. Besides, the summons was for relief, showing that the plaintiff intended not to commence an action upon the note, and the complaint shows conclusively that he carried out that intention.

This was a case, therefore, where the defendant had a right to omit making a motion to set aside the order of arrest, and contest the facts upon the trial. He had every legal reason for regarding this as an action

Elwood *v.* Gardner.

founded upon *tort*, which the plaintiff was bound to prove, and which he could contest, upon the trial.

It seems that at the trial the plaintiff abandoned his action for fraud, and the court allowed him to take judgment against the defendant as indorser of the note. It is unnecessary to determine whether this was error or not, as that question is not before us, but if it was not (and the plaintiff cannot question its correctness upon this motion), it must have been upon the ground that the complaint contained two causes of action, one upon contract, and the other for fraud, or that, under the liberal policy inaugurated by the Code, the plaintiff was entitled to winnow out from the complaint the facts stated, by way of inducement, and reconstruct them into an action on contract and recover thereon.

The case presented is this. The plaintiff commenced an action to recover damages for fraud and deceit, and procured an order of arrest, upon the identical facts constituting the cause of action as set forth in the complaint. The defendant omitted to move to set aside the order of arrest, relying upon his procuring a discharge therefrom by defending the action, and contesting the facts upon the trial. At the trial the plaintiff abandoned his cause of action, and procured a judgment upon contract, as if in an action in which the defendant was not liable to be arrested except upon extrinsic facts to be proved by affidavit, and now claims that the defendant is concluded by the order of arrest in the same manner as though the action had been brought on the contract, and the order of arrest had been procured upon outside facts stated in the affidavit.

This practice is too sharp. Whether intended or not, we can see that it might have operated as a fraud upon the defendant. If the action had been upon the note, as the recovery was, the defendant would have known that he could only contest the right to the order

Elwood *v.* Gardner.

upon a motion to set it aside, but he had legal reasons for believing that he could do it at the trial.

He was deprived of that right by the action of the plaintiff. The consequence may be to enable the plaintiff to imprison his debtor contrary to law, and to deprive him of the opportunity to contest his right to do so.

It cannot be said that the defendant has lost the opportunity by his own laches. That would have been so, if the action and recovery had been for the same cause; but it was not negligent in the defendant to await the trial and meet the allegations of fraud upon which the order was obtained, in the forum to which the plaintiff had invited him. The power of the court below to relieve a party under such circumstances is undoubted, within the principle laid down in 30 *N. Y.* (*supra*).

Imprisonment for debt is abolished, except in certain specific cases; and if a party seeks to imprison his debtor, he must bring the case clearly within one of the enumerated exceptions, and prove it according to prescribed practice.

The order must be affirmed.

Order affirmed, with costs.

The plaintiff subsequently applied for a rehearing of the appeal, or a modification of the order, which application he argued upon the following grounds; insisting that,

I. The point determined was not argued, and the fact that the general term had, by its judgment, authorized the executions, was overlooked.

II. That defendant, by not appealing from the judgment, had acquiesced in its rightfulness, and was

Elwood *v.* Gardner.

estopped from asking that the execution be vacated on the ground assigned.

III. That the practical effect of the decision was to deprive plaintiff of the benefit of the judgment, without his being heard in support of it; that the judgment might be sustained by authorities which he was prepared to adduce; and that the affidavit on which the order of arrest was granted alleged other and sufficient grounds of arrest, beside the fraud stated in the complaint; and that the insertion of the averment of fraud in the complaint was not with a view to mislead defendant, but as a matter of precaution,—as the decision in *Wood v. Henry* (40 N. Y. 124), had not then been reported. That the form of the summons did not prejudice defendant; and that a reversal of the order would leave defendant to appeal from the judgment, which he ought to do if it were erroneous.

IV. That by affirming the order the court granted defendant relief as a favor, not as matter of right, because plaintiff had been strictly regular.

V. If defendant be relieved at all, it should only be on condition of charging him with costs, and of requiring him to stipulate not to sue for false imprisonment; and to stipulate also that the judgment be vacated without prejudice to a new action, and the arrest of the defendant therein, for the alleged fraud.

VI. That unless this were done, plaintiff was stigmatized with having pursued discreditable practice, and subjected to undeserved liability and deprived of the means of the collection of his debt.

Edwin G. Davis, opposed.

BY THE COURT.—The motion for re-argument or modification was denied, but without costs.

Bininger *v.* Clark.

BININGER *against* CLARK.

Supreme Court, Second District; Special Term, 1870.

GOOD WILL.—FIRM NAME.—INJUNCTION.—RECEIVERSHIP.—BANKRUPTCY.

The good will of a business firm is regarded in equity as a part of the assets; and, after dissolution, a partner may be enjoined from appropriating it to the exclusion of the other partners.

Abraham Bininger Clark, who had been a partner in the firm of A. Bininger & Co., usually writing his name Abm. B. Clark, continued a similar business on his own account, after dissolution of that firm, and put up his name as A. Bininger Clark, successor of A. Bininger & Co.;—*Held*, that he might be restrained by injunction from the use of such a style.*

Even after a receiver of partnership property has been appointed, or an assignment in bankruptcy has been made by a firm, one of the parties may bring an action to restrain another from a wrongful attempt to appropriate the good will and name of the former firm; for he has an interest in protecting the property so that his debts may be discharged and leave a surplus possible.

* There are three distinct grounds of relief, in different cases, against the usurpation of names—INFRINGEMENT OF TRADEMARK, INTERFERENCE WITH GOOD WILL, and DEFAMATION.

A civil action does not lie for the mere use of a family surname (*Du Boulay v. Du Boulay*, 2 *Law R. P. C.*; 17 *W. R.*, 594; 38 *Law J. P. C.*, 35; *Moore, P. C. C. N. S.*, 81). And it has been held that one who does not use his name in a business, cannot invoke the powers of a court of equity to enjoin others from so dealing in the business as to impute their products to him, until he has recovered damages for defamation. So held of a physician aggrieved by the advertising of a quack medicine in such terms as to indicate that it had his sanction (*Clark v. Freeman*, 12 *Jur.*, 149; 17 *Law J. Ch.*, 142).

The infringement of trademarks is a cause of action, both at law and in equity. Relief on this ground depends always on priority of use (see *Congress & Empire Spring Co. v. High Rock Congress Spring*, 10 *Abb. Pr. N. S.*)

Bininge *v.* Clark.

Motion for an injunction.

This action was brought by Abraham Bininge against Abraham B. Clark and Melville B. Clark, to enjoin the latter from an alleged wrongful use or imitation of the firm name of the late firm of A. Bininge & Co., in which both parties had been partners. The firm had become insolvent, and had been dissolved; a receiver having been appointed in the New York superior court; and proceedings in bankruptcy, which had been taken in the United States courts, also having resulted in the appointment of an assignee, and the making of an assignment to him. These proceedings are stated in 38 *How. Pr.*, 341; 39 *Id.*, 363.

The complaint alleged that plaintiff and the defendant, Abraham B. Clark, had for many years been doing business under the name of A. Bininge & Co.; that the business had been established for over ninety years, and during the whole of that time the firm had been either A. Bininge, or A. Bininge & Co.; that the good will of the firm was one of the most valuable items of the firm property; that the plaintiff had, since the proceedings in bankruptcy, been deprived by the defendants of the possession of the store, firm books, &c., and had been prevented from exercising acts of owner-

But on the doctrine of trademarks, one cannot be enjoined from using his own name, merely because it is similar to that of a rival. Any injury which one suffers by competition of others of the same name, from the use of such name merely, and without fraud, is, as a general rule, without remedy under the law of trademarks (*Faber v. Faber*, 3 *Abb. Pr. N. S.*, 115; *S. C.*, 49 *Barb.*, 357; *Burgess v. Burgess*, 3 *De G. M. & C.*, 896; 17 *Jur.*, 292. Compare *Sykes v. Sykes*, 5 *D. & R.*, 292; 3 *B. & C.*, 541; *Howe v. Howe Machine Co.*, 50 *Barb.*, 236).

Where, however, the ownership, as between the parties, of the good will of a business is involved, another element enters the case, which gives an additional ground of relief, as in the case in the text.

Bininger *v.* Clark.

ship, &c.; that the defendants had hired a store adjoining the store of A. Bininger & Co., which was at Nos. 92 and 94 Liberty-street, and commenced business under the name of A. Bininger Clark & Co.; that they had put upon the store of A. Bininger & Co. a sign stating that "A. Bininger Clark & Son had removed to No. 96, next door below;" that they had distributed among the customers of the old firm, and printed in various newspapers, circulars to the effect that they were the successors to A. Bininger & Co.; that they had suspended a banner across Liberty-street with the words "A. Bininger Clark & Son, Successors to A. Bininger & Co." thereon, and had put other signs upon their store to the same effect; that the defendant A. B. Clark had never been previously known as A. Bininger Clark, but as Abraham B. Clark, and had always so signed himself; that the defendants gave the impression to their customers and others that the plaintiff was a member of the firm of A. Bininger Clark & Son; that this conduct was intended and calculated to divert the good will of the firm of A. Bininger & Co. to the firm of A. Bininger Clark & Son, and was fraudulent on the part of defendants, and tended to great and irremediable loss on the part of plaintiff. The complaint closed with a prayer for a perpetual injunction from using the name "A. Bininger."

The defendant, A. B. Clark, in his answer, set up the appointment of the receiver of the partnership property in the action in the superior court of the city of New York, and of the assignee in bankruptcy in the proceedings in the United States district court; and claimed that the cause of action, if any, belonged to the receiver or the assignee. The answer also alleged that the defendant's name was A. Bininger Clark, and that he had, some years prior to this action, so written his name and been so called; that the good will of the firm had been greatly injured by plaintiff's acts, and that

Bininge *v.* Clark.

the suspension of payment was the act of plaintiff to defraud defendant of his interest in the firm assets; that being, as well as the plaintiff, a grandson of the original A. Bininge, he was as much a Bininge as plaintiff; that he was at liberty to write his name A. Bininge, and ended with a denial of the fraud and collusion charged in the complaint.

Tompkins Westervelt, for the motion.—I. The good will of a commercial business or trade constitutes a part of the firm assets, which, upon dissolution, must be sold, being by nature indivisible (*Colly. on Part.*, §§ 162, note 3; 322, note 4; *Story on Part.*, § 99; *Dougherty v. Van Nostrand*, 1 *Huffm. Ch.*, 68; *Williams v. Wilson*, 4 *Sandf. Ch.*, 379; *Fenn v. Bolles*, 7 *Abb. Pr.*, 202; *Featherstonhaugh v. Fenwick*, 17 *Ves.*, 298; *Gow on Part.*, 255).

II. Upon the dissolution of a firm, each partner has a right in equity to have the partnership property preserved and applied to the firm debts (*Smith v. Haviland*, cited in *Deveau v. Fowler*, 2 *Paige*, 401; *Story on Part.*, § 326). Equity will enjoin a partner from injuring or impairing the partnership property (*Story on Part.*, § 329; 4 *Sandf. Ch.*, 380, 381; *Story Eq. Jur.*, §§ 669, 672).

III. Equity will enjoin these defendants from using plaintiff's name, or the name of plaintiff's firm, or any part of either (*Story's Eq. Jur.*, § 951; *Story on Part.*, §§ 211, 212; *Howard v. Henriques*, 3 *Sandf. Ch.*, 725; *Woodward v. Lasar*, 21 *Cal.*, 448; *Taylor v. Carpenter*, 11 *Paige*, 292; *Bell v. Locke*, 8 *Paige*, 75; *Clarke v. Clarke*, 25 *Barb.*, 76; *Knott v. Morgan*, 2 *Keen*, 213; *Wellington v. Fox*, 3 *Mylne & C.*, 338; *Croft v. Day*, 7 *Beav.*, 84; *Edleston v. Vick*, 23 *Eng. Law & Eq.*, 51).

IV. The receiver of the superior court held the firm property for the benefit of Bininge to the extent of his

Bininger *v.* Clark.

interest, pending the action to wind up the partnership. The assignee in bankruptcy holds any surplus in trust for Bininger. In the preservation of that surplus Bininger has a personal interest for which he may, in equity, proceed in his own name, notwithstanding the assignment (*Sedgwick v. Cleveland*, 7 *Paige*, 290; *Deveau v. Fowler*, 2 *Id.*, 400).

M. Compton, opposed.—I. Plaintiff is restrained from interfering with the assets of the firm of A. Bininger & Co., by the injunction of the superior court.

II. The title to the property is vested in the assignee in bankruptcy (*Bankrupt Act*, § 14).

III. The title to the property is in the receiver of the superior court.

IV. The name of “A. Bininger & Co.” is not a trademark, and plaintiff has no exclusive right to it.

V. The name used by defendants was not the name of the firm of A. Bininger & Co.

VI. The propriety of the action in the superior court is *res judicata*.

VII. The equities of the bill are all denied, and in such case there must be strong supporting evidence to sustain the injunction (*Hoffman v. Livingston*, 1 *Johns. Ch.*, 211; *Roberts v. Anderson*, 2 *Id.*, 202; *Skinner v. White*, 17 *Johns.*, 357).

VIII. The bill itself shows no superior equity.

IX. The damage is only apprehended. In such case, the case must be strong and free from doubt.

X. One partner cannot sue his copartner respecting the copartnership, except on an accounting.

XI. Where the injury complained of results from persons using their proper names, it is no ground for an injunction. The restraint is as great as the injury.

PRATT, J.—The good will of a business firm is an

Biningen *v.* Clark.

important part of its property, and will be protected by a court of equity whenever a proper case arises. In this case it is alleged and not denied that it constituted the most valuable part of the firm assets. Any appropriation of it by one partner to the exclusion of the other, unless acquired upon a fair sale, is manifestly a wrong not to be tolerated.

The facts shown clearly sustain the plaintiff's allegations that it has been so appropriated. The defendant closely imitates the name of the late firm, and not satisfied with that, describes himself as "Successor to A. Biningen & Co."

He also placed signs in close proximity to the firm's late place of business, with the plain intent of diverting any trade that followed the late firm to the place now occupied by him.

If this is allowed, the plaintiff's interest in the good will of A. Biningen & Co. will be destroyed.

The fact that defendant's name is "A. Biningen Clark," does not obscure the defendant's wrongful design, nor in any manner change the case.

After having for forty years written his name "Abm. B. Clark," his now writing "A. Biningen Clark," cannot be considered an accident. If it is one, he should be admonished not to continue it in a manner so likely to mislead the public.

Our statutes provide for changing names, and it has been held that at common law a person may change his name at will. But it by no means follows that after making such change a person may so use his new name as to attract business from another person whose name he has adopted.

The receivership does not affect the right of the plaintiff to bring this suit, nor does the assignment in bankruptcy. The plaintiff has an interest in protecting the property of the late firm, so that his debts may be

Bailey *v.* Belmont.

discharged, and possibly a surplus realized for his own use. He is therefore a proper person to bring this suit.

The injunction must be continued.

BAILEY *against* BELMONT.

New York Superior Court; General Term, January, 1871.

RECEIVER.—RESCISSON OF EXECUTORY CONTRACT.

A plaintiff may have a receiver appointed before trial, even when other receivers of the same funds have previously been appointed by other courts in separate actions. But the later appointment must be subject to the exercise of the powers of the previously appointed receiver, or any other prior judicial authority under which the funds in controversy are held.

An action lies to recover back from the depositary, moneys contributed by plaintiffs, to be used in another country in aid of a revolutionary struggle against a government at peace with the United States, but which have not been so applied before suit brought.

Moneys may lawfully be subscribed *here*, to be used in another country to aid it in a revolutionary struggle against a government at peace with the United States, if no violation of the neutrality laws be committed.

Appeal from an order appointing a receiver.

This action was brought by William H. Bailey against John O'Mahony, Thomas J. Barr, August Belmont, and Ernest B. Lucke.

The complaint in the action alleged that John O'Mahony, one of the defendants, had received from a large number of persons large sums of money, and had

Bailey *v.* Belmont.

given in return therefor certificates of ten dollars each, signed by said O'Mahony, payable to bearer, of which the plaintiff was the holder and owner of the aggregate of one hundred dollars.

Such certificate was as follows :

No. 1,665.

10.

No. 836, E.

10.

It is hereby certified, that the Irish Republic is indebted unto — — —, or bearer, in the sum of ten dollars, redeemable six months after the acknowledgment of the Independence of the Irish nation, with interest from the date hereof inclusive, at six per cent. per annum, payable on presentation of this bond at the Treasury of the Irish Republic.

March 17, 1866.

(Signed)

JOHN O'MAHONY,
Agent for the Irish Republic.

Office of the Secretary
of the Treasury.

[L. S.]

The complaint further alleged that no such nation or government existed or was known as the Irish republic, but that the money so received by O'Mahony was obtained upon his representation that the same was to be used by him in behalf of the Irish republic in the struggle of the Irish people for independence as a nation, and that upon such representation O'Mahony had obtained many thousands of dollars, a portion of which he had deposited with the defendants, Belmont and Lucke.

The action was in behalf of the plaintiff, and all other holders of similar certificates, and sought payment of the certificates out of the moneys in the hands of Belmont and Lucke.

It appears that a receiver of the same moneys had been appointed in an action in this court, instituted by O'Mahony against Belmont & Lucke to receive the

Bailey *v.* Belmont.

same money ; and it was alleged, as a foundation for the motion, that a portion of "the funds so deposited with Belmont & Lucke has been placed in the hands of the chamberlain of the city of New York," in a certain *action pending in the supreme court, in which said O'Mahony is a party, claiming to be entitled to receive said funds.*"

Upon these facts, a motion was made to appoint a receiver in the action, and "*to take possession of said funds now in the hands of the city chamberlain,*" and for other relief.

The motion was granted, and an order was thereupon entered appointing Thomas J. Barr receiver of all the moneys and funds placed in the hands of August Belmont & Co. by John O'Mahony, and derived from the sale of Fenian bonds, and also of all the funds and moneys deposited in the hands of Peter B. Sweeny, the city chamberlain of New York city, in a certain action pending in the supreme court, in which said O'Mahony was a party claiming to be entitled to receive said funds, and also of all the funds and moneys wheresoever situated, and in whosesoever hands the same might be, which were derived and accumulated by the said O'Mahony by the sale of Fenian bonds mentioned and described in the complaint. Under this order the receiver took possession of over forty-seven thousand dollars.

The defendants Belmont & Lucke appealed.

W. W. Macfarland, for appellants.

R. S. Guernsey, for respondent.

BY THE COURT.*—*MONELL, J.*—If this action can be sustained by the plaintiff, I can see no reason why he should not have a receiver to protect his interest in it. Of course, such receiver must necessarily be subor-

* Present, *MONELL, JONES, and SPENCER, JJ.*

Bailey *v.* Belmont.

dinated to any receiver already appointed, or to any other authority under which the money in controversy, or any part of it, is now held. But it is obviously proper that the plaintiff in this action should not be prejudiced by the action of the plaintiffs in any of the several other actions which it appears are now pending, and which relate to the same fund, or to some part of it, that is involved in this action.

The order appealed from is probably too general in its terms, and confers, perhaps, more power upon the receiver than is proper, or was designed, and it must, therefore, be modified so as to subordinate his functions to those of any previously appointed receiver, as well as to those of the city chamberlain, in respect to the portion of the moneys alleged to have been deposited with him in the action pending in the supreme court.

The effect of such a modification of the order will be to leave the receiver to come in after the prior receiver becomes *functus officio*, and to take from him the fund, or any remaining portion of it; and in that way the plaintiff's interest in this action will be protected.

If the authority under which it is alleged a portion of these moneys has been deposited with the city chamberlain is not sufficient, the receiver can ascertain it, and his receivership will give him a right to make the inquiry; and, if he shall be so advised, to apply to the supreme court in the action there pending, to be placed in possession of these funds. But this court cannot make any order in respect to that action, nor in respect to the subject of it, which will or may conflict with the jurisdiction which that court has already obtained. Nevertheless, the receiver appointed in this action will be in a position to take the money deposited with the city official, or such of it as may remain, on the determination of that action. It may be true, as was urged on the argument, as a reason for reversing this order, that the plaintiff could have applied in the O'Mahony suits pending in the supreme court, and also in this

Bailey *v.* Belmont.

court, to be made a party to those suits, for the purpose of protecting his rights to a portion of the fund which is in controversy there.

But even if he could do so, I do not think he was bound to do so, and as the receivership created by the present order is, as has already been said, necessarily subordinated to all previous receiverships of the same fund, it cannot injure other parties, and is a needed and proper protection to the plaintiff in this action.

But this order cannot be sustained for any purpose, if, as was urged by the appellant, the plaintiff has no cause of action which it is proper for a court of justice to entertain. I pass over the doubt, which might reasonably arise, whether a recovery can be had upon the *certificates* of which the plaintiff alleges himself to be the owner and holder, without also alleging that he obtained them as a *contributor* to the funds, and not as a purchaser in the market, and take up the objection, that the purpose for which these moneys were obtained was unlawful, and being unlawful, the courts should not be open to parties engaged in such illegal acts.

It is probably true, and it is so substantially alleged in the complaint, that the money contributed to the "Fenian fund," as it was called, was designed to be used in subverting the established government, which then and now exercises dominion over the Irish people, and in erecting upon it a republic, or such other form of civil government as would secure the independence of that nation.

A purpose of that nature, had it been attempted to carry it into execution in opposition to the principles of neutrality which have so long governed the United States, in respect to the internal strife of foreign nations, would have been unlawful. But it by no means follows, that because money is contributed to assist a revolutionary struggle, it may not lawfully be done, without violating any laws of neutrality, and such

Bailey *v.* Belmont.

would be the case when the money, although contributed here, was to be used only in the country where the struggle for independence was going on.

Our laws of neutrality prohibit the organizing and fitting out, with arms and ammunitions of war, expeditions into any foreign country with which we are at peace, and our government always has, and I believe always will rigidly enforce the neutrality of her citizens within the letter and spirit of the law, and prevent any attempted interference with the government of other nations.

But to the extent only that has been stated, does this government see fit to interfere. The money of her citizens may be contributed to aid struggles for liberty in any part of the world. It was done, and nobly done, when Greece, and Poland, and Hungary were, at different periods struggling to be free from monarchical bondage, and establish the independence of those nations ; and it will continue to be done, whenever any people should attempt to overthrow existing monarchies or despotisms and establish free governments in their stead.

It does not appear in this case that the fund in question was designed to be used in any manner that would violate the neutrality laws of this country. There is no allegation that the projectors were engaged in organizing or fitting out armed expeditions into British territory, or that the money, or any part of it, has been or was to be used for such a purpose ; but the allegation is simply that it was "to be used on behalf of the Irish republic, in the struggle of the Irish people for independence."

The purpose, therefore, so far as the complaint shows, for which the money was contributed, was lawful and proper, and in none of its aspects it is against public policy to open the courts to a contributor who desires to rescind his subscription after the project has been abandoned and given up, and get back his money.

Bailey *v.* Belmont.

But, even if the transaction could be regarded as unlawful, either as opposed to some statute, or as being against public policy, or otherwise, I yet can see no reason why this action may not be maintained.

Had the money been used or expended for any unlawful purpose, it could not be rescinded except where a recovery may be had under the provisions of some peculiar statute. But where the purpose for which the money was advanced or contributed, has been neither accomplished nor attempted, and the money remains unemployed, a depositary or contributor may rescind the contract and prevent the thing being done, and recover back his money. Thus, money lent to be used for betting at a gaming table, *cannot, after it is lost*, be recovered back. But *before* it is lost, the lender may rescind and recover. In this case the transaction is still executory, and it is not too late to render the rescission operative. So, in this case, the purpose for which the money was contributed not having been accomplished, or even attempted to be accomplished, and now having been wholly abandoned, the plaintiff has a right to rescind, and his rescission will become operative upon the fund in question.

I refer, in support of these propositions, to *2 Pars. Cont.*, 253; *White v. Franklin Bk.*, 22 *Pick.*, 181; *Cotton v. Thurland*, 5 *T. R.*, 405; *Smith v. Bickmore*, 4 *Taunt.*, 474.

The order must be modified, by inserting therein that the authority of the receiver thereby appointed shall in no wise interfere with the authority of any other and previously and lawfully appointed receiver or custodian of the same fund or any part of it, except by action brought with the permission of the court or tribunal which has appointed such other receiver or custodian.

SPENCER and JONES, JJ., concurred, the latter on the ground that the complaint did not show any illegality in the transaction.

Townsend *v.* Glen's Falls Ins. Co.

TOWNSEND *against* THE GLEN'S FALLS INSURANCE COMPANY.

New York Superior Court; General Term, October, 1870.

REFERENCE.

The report of several referees, procured by the successful party to be signed by the referees separately, without their having come to any agreement on a report while together, is irregular, and should be set aside on this ground, although the party may have acted in good faith in procuring it.

In causes referred to several referees, there must be a conference of all, and a substantial conclusion by a majority, embodied in a report made by them when they are together.

After the hearing of the cause before three referees, and a consultation in which a majority fail to agree upon a conclusion or any findings, two of them cannot make a report by signing separately their conclusions, nor can two, upon a conference, agree to a conclusion and make a report without a conference of all.

Appeal from an order.

Charles R. and Theodore E. Townsend brought actions against the Glen's Falls Insurance Company, the Narragansett Fire and Marine Insurance Company, and the Merchants' Insurance Company, respectively, to recover upon three policies issued by those companies. The causes were referred to three referees, two of whom were merchants, and the other a counselor at law. The referees all met, took testimony, and heard the arguments; subsequently to which, the attorneys received notice from the professional member of the board of referees that the referees had concluded that they could not come to any satisfactory conclu-

Townsend *v.* Glen's Falls Ins. Co.

sion, and so decided. Subsequently, as alleged in the affidavit of the plaintiffs' attorney, in consequence of interviews between one of the attorneys for the defendants, and one of the non-professional referees, a report in favor of the defendants, drawn by defendants' attorneys, or one of them, was signed by each of the two non-professional referees, separately, at their respective places of business.

This report found in favor of the defendants, and directed the complaint to be dismissed with costs.

The plaintiffs' attorney moved at special term to set aside the report in each case. The motion was opposed by the defendants, upon affidavits made by the non-professional referees, and by one of the defendants' attorneys, alleging that the non-professional referees were led to understand upon the trial that there could be no findings unless all the referees should agree, and consequently no report had been made while they were together; but that subsequently, one of them having verbally informed the attorney for the defendants of the circumstances of their disagreement, they ascertained that the report of two referees would be valid; in consequence of which one of them requested the defendants' attorney to draw reports embodying their conclusions, which was done, and they respectively signed the same.

The motion was denied at special term, with leave to appeal, and a stay of all proceedings after entry of judgment.

Osborn E. Bright for the plaintiffs, appellants.—The report was irregular and void, because not made upon the meeting and deliberation of all the referees.

I. Every mode of trial known to common law required final deliberation on the part of all the triers, and, also, unanimity in their judgment. (1.) All actions, except that of account, were tried before a jury.

Townsend *v.* Glen's Falls Ins. Co.

(2.) In the action of account, it seems to have been the practice to appoint two auditors, and both, presumably, joined in the judgment (*Smith v. Smith*, 2 *Chitty*, 10). In one case (*Godfrey v. Saunders*, 3 *Wils.*, 73), three auditors were appointed by special consent, but the case was otherwise decided. (3.) In arbitration at common law, all the arbitrators must join (*Green v. Miller*, 6 *Johns.*, 39; *Cope v. Gilbert*, 4 *Den.*, 347). In actions not referable by statute, reference by stipulation operates as a discontinuance, and is an arbitration (*Green v. Patchen*, 13 *Wend.*, 292; 17 *Johns.*, 129, 342, 461; 18 *Id.*, 26).

II. The statutes authorizing references do not overturn the principles of the common law modes of trial, except by express provision. These statutes make only the express exception that two referees may make a valid report, and it cannot be inferred that the third referee may be excluded from these deliberations. By necessary implication, as well as by terms, they require the consultation of all the referees in making the report (*Van Schaick's Laws of N. Y.*, 517; *Brown v. Kingsley*, 1 *Johns. Cas.*, 334; *McInroy v. Benedict*, 11 *Johns.*, 402; 2 *Rev. Stat.*, 384, §§ 42, 44, 47; *Clark v. Fraser*, 1 *How. Pr.*, 98; *Code of Pro.*, § 421; *Fielden v. Lahens*, 14 *Abb. Pr.*, 48).

III. There seems to be express statutory provision that the referees shall decide a cause only upon the meeting and deliberation of all (2 *Rev. Stat.*, 555, § 27; *People ex rel. Haws v. Walker*, 2 *Abb. Pr.*, 421).

IV. This rule rests upon two good reasons. (1.) A party has an absolute right to the benefit of whatever influence each member of a duly constituted tribunal may exert on the final decision (*Morss v. Morss*, 11 *Barb.*, 510). (2.) The evils which may result from disregarding this right are serious. The spectacle of two laymen drawing findings or conclusions, or, what is

Townsend *v.* Glen's Falls Ins. Co.

worse, adopting such as are put into their hands, is, itself, enough to justify the rule.

V. If it is claimed that the practice of an appellate court, in deciding appeals, is applicable to a trial by referees, we answer: (1.) The trial of an issue by more than one judge is unknown, and there is no necessary analogy between a trial and a review of a trial on appeal. (2.) But the analogy, if any, is in our favor, for the execution of any judicial act, requires the presence of all the persons by whom it is to be done (*Corning v. Slosson*, 16 *N. Y.*, 294; *Harris v. Whitney*, 6 *How. Pr.*, 175; *Morss v. Morss*, 11 *Barb.*, 511; *Grindley v. Barker*, 1 *Bos. & P.*, 229; *King v. Forrest*, 3 *Term R.*, 39; *Billings v. Prinn*, 1 *Wm. Blacks.*, 1017). *Parrott v. Knickerbocker Ice Co.* (38 *How. Pr.*, 508), is not an authority against this proposition, for it turned on an irregularity in the form of judgment. The report should be set aside because it was obtained by improper influence. Neither the plaintiff nor the court can feel assured that the report is such as the referees would have made if left to their own deliberations (4 *How. Pr.*, 153; 12 *Id.*, 297; 8 *Abb. Pr.*, 141).

BY THE COURT.*—SPENCER, J.—The report of the referees, in the several actions, should be set aside for error and irregularity in the manner of making the same.

It clearly appears to me that no decision or conclusion in either of the cases was ever reached or agreed to by the referees at any time when they or any two of them were together. At the conclusion of the conference they had on June 6, 1870, they separated without any decision or conclusion being reached or announced to each other by any two of them. It appeared that they separated with the im-

* Present, McCUNN and SPENCER, JJ.

Townsend *v.* Glen's Falls Ins. Co.

pression that a conclusion or report could not be made, because of a diversity of opinion among them. It matters not how that impression was created. Its existence determines the fact that, at the time of their separation, they had not, nor had any two of them, agreed upon any conclusion or decision in either of the cases.

Each had concluded that a decision could not be made, *and none was made.*

They never afterwards met as referees; never conferred together on the subject matter of the reference; never agreed as to any conclusion in the premises, when together—*nor did any two of them, when together,* agree to any conclusion or upon any report in the cases.

The attorney or counsel for the several defendants, drew up a formal report, which two of the referees signed, without any conference or coming together or agreeing together at the same time and place, upon the conclusions of fact and law embodied in the report. I hold this action to be irregular and improper on the part of the referees in the performance of their duties, and of sufficient importance in the way of error on their part to authorize and justify this court in vacating and setting aside their report.

I fail to discover any breach of good faith in this matter on the part of the referees or the attorney for the defendants. I have no doubt they each meant to act legally and properly in the premises, and supposed they were so doing in all respects; but I think it very clearly appears by the testimony that this report would not have been made by the two referees, unless they had been stimulated by the advice and energetic action of the defendants' counsel, all of which appears to have reached and affected each of them separately, and in the absence of the other or others, and also in the absence of plaintiffs' counsel.

Townsend *v.* Glen's Falls Ins. Co.

The regular and proper course for the defendants' counsel to have pursued in the premises would have been to have obtained another meeting of all the referees, if practicable, and to have advised or claimed a report from a majority, in the presence of opposing counsel.

I hold that in all reference cases there must be a conference of all the referees. That there must be a substantial conclusion agreed to between at least two of the referees upon the several questions of law and fact, necessary to be embodied in the report at such conference, or *when they are together*; and I am much inclined to believe that the written report should be considered and signed by them at the same time and place, although this latter conclusion may be deemed extended and doubtful under the decisions. I can find no special case that I consider authoritative and decisive, as a precedent to guide the conclusions of the court in this case, although the principle that should govern the same clearly appears.

The Code and statutes prescribe that all the referees shall hear all the proofs and allegations of the parties, and provide that any two of them may make a report in the case. The expressed opinions of the judges in the cases upon this subject seem to hold that the referees must all meet and confer together, and conclude upon their decision and findings in the case, upon those proofs and allegations; but they are silent upon the legal points involved in this case.

1. After the hearing of a cause before three referees, and after a consultation in which they or any two of them fail to agree upon a conclusion in the case, or decide upon any findings of law or fact whatsoever, can two of them afterwards, without another meeting of all, agree to a conclusion and make a report without a conference or consultation of all the referees? or,

2. As in this case, after separating without agree-

Townsend *v.* Glen's Falls Ins. Co.

ing to any conclusions of fact or law as a basis of a report, and without agreeing to report at all, except the fact of a disagreement, can two of these referees make a report, by signing separately formal written conclusions of fact and law, without meeting together and agreeing together to make and sign the same, and without any further meeting of all the referees?

3. Can referees, or two of them, make and sign a formal report and decision of the case, separately, and at different times and places? I am clearly of the opinion that the first and second queries should be answered in the negative, and that is sufficient for this case.

Referees should be held to a strict and impartial performance of their duties, and if this high standard should be extended to making and signing their report at the same time and place, I can see no wrong thereby to be done, and much to be avoided. I hold the practice illustrated in this case to be irregular and erroneous, and contrary to the principles that should govern reference cases; and I hold this without suggesting a suspicion as to the good faith and intention of the referees in the premises, and without reference to their subsequent agreement or present opinions as to the correctness of their conclusions in the case.

The approval of such a practice would open the door widely for the perpetration of great frauds, and for the practice of improper influence upon the actions of referees.

I take this opportunity to say that I hold as an opinion of the proper practice in like cases, that after the submission of a controversy, a referee should not consult with nor receive any suggestion or advice from any of the parties or their respective counsel, in regard to the subject matter of the reference, or to his finding or report therein, except in the presence of the opposing party or his counsel.

Townsend *v.* Glen's Falls Ins. Co.

Referees, like judges, should avoid even the appearance or suspicion of unfairness or prejudice in the performance of their duties, and in all cases when they deem it necessary to hear the views of counsel, or obtain their assistance in regard to the case, or as to the form and substance of their report, they should exercise their undoubted power and privilege, by calling the respective counsel of both parties before them for that purpose, or request each of them to furnish a proposed formal report that should be made upon the general conclusions they have reached in the cause.

This report must be set aside, the order of the special term reversed, the order of reference vacated, and a new trial ordered; costs to abide the event of the same.

McCUNN, J.—These cases were referred to three referees—one of whom was Hon. WILLIAM MITCHELL, counselor at law. The others were F. B. Thurber and Thomas Houston, grocers. The proofs were submitted on July 5. On July 6 the referees met for consultation and decision, and being unable to come to a satisfactory conclusion, they adjourned *sine die*. This is not disputed. On the twenty-ninth of said month, Thurber and Houston were approached separately by defendant's counsel, and after some advice on his part, the two referees, Thurber and Houston, signed, at different times, and not in the presence of each other, and not at the place where the reference was formerly held, but at their different places of business, a report drawn by defendant's counsel in said defendant's favor. This is not disputed, but is admitted in the affidavits of Mr. Ellis and of the two referees, Thurber and Houston. There was no consultation whatever among the referees after the meeting of July 6, and, as I have said before, the concurrence of Thurber and Houston in their report was effected through the defendant's counsel, he being

Townsend *v.* Glen's Falls Ins. Co.

the medium of communication, so that no decision was reached by the grocer referees until July 29, the date of their report, and that decision was made without any consultation or unison with each other. Now if this course could be sanctioned, there would be an end of all fairness in the trial by referees. I do not doubt, for one moment, that if Judge MITCHELL had been notified, and then not attended, and a report had been made by the others in his absence; or if he had attended and had disagreed, that then the judgment upon the report of the two would have been correct. But to allow referees,—and laymen at that,—to separate without coming to a conclusion, and then to allow two out of three of such referees to meet with counsel at different parts of the country and not together, and in the absence of each other, and in the presence and under the direction of the counsel in whose favor the report is made, only, would be dangerous doctrine. All modes of trial known to the common law require not only deliberation on the part of the triers, but also unanimity in their judgment. Indeed, section 272 of the Code declares that trials by referees shall be conducted "in the same manner as trials by the court." Now in a trial in court, a judge and jury all must agree, and all be present before a verdict can be rendered. So must it be with referees; if all do not agree, at least all must be present, so that a majority can agree. Even in the ancient action of account, it was the practice to appoint two auditors, and both auditors always joined in the judgment (*Smith v. Smith*, 2 *Chitty*, 10).

It was held in the case of *Green v. Miller* (6 *Johns.*, 39), that all the arbitrators must join in the award. And this doctrine was clearly established in regard to referees in the cases of *McInroy v. Benedict* (11 *Johns.*, 402); and *Brower v. Kingsley* (1 *Johns. Cas.*, 334). Moreover, I deem this question to be settled by this court in the case of *Fielden v. Lahens*, where Mr. Justice MONELL held that "In all proceedings connected

Townsend *v.* Glen's Falls Ins. Co.

with the trial before referees, all the referees must be present, not only to hear the proofs and allegations of the parties, but in their deliberations upon the evidence and in making up their report." It is a well established doctrine, that where any judicial act is to be done by two or more persons, all who engage in the act must be present together at the time of executing, or they must be legally notified to be there (King *v.* Forrest, 3 *Term*, 39; Billings *v.* Prinn, 2 *Wm. Blacks.*, 1017; Morss *v.* Morss, 11 *Barb.*, 510; Corning *v.* Slosson, 16 *N. Y.*, 294).

Again, the court cannot feel assured that the reports are such as the referees would have made if left to their own deliberations. It is urged, but with no force whatever, that the two referees, Thurber and Houston, had agreed with each other at the last meeting held with Judge MITCHELL. They may have agreed individually, each in his own mind, that the complaints should be dismissed, and may have communicated that fact to each other; but, notwithstanding, they and Judge MITCHELL did not agree to that report; nor did the two lay referees agree with each other to overrule Judge MITCHELL before they separated; on the contrary, they agreed to and did separate without agreeing, and left each other's presence without such agreement. They say, moreover, they were induced to do so by something which Judge MITCHELL told them. I care not what they disagreed about, nor the cause of their separation. It is enough that they did not agree, and that no meeting of any kind, either with two or three referees, was held after that. In the absence of such a meeting, a report made and carried out as this one was should be promptly set aside.

SPENCER, J.—I concur.

Orders accordingly.

The defendants appealed to the court of appeals, when the plaintiff (*Osborn E. Bright*, of counsel), took

Shears *v.* Solhinger.

the objection that the orders were not appealable, because they involved an exercise of discretion.

The court of appeals dismissed the appeals, and the dismissal was understood to be upon that ground.

SHEARS *against* SOLHINGER.

Supreme Court, First District; Special Term, December, 1870.

BANKRUPT ACT.—STATE INSOLVENT LAWS.—DISCHARGE FROM IMPRISONMENT.

A discharge in insolvency, applied for and obtained in conformity with a State law, subsequently to the passage of the United States bankrupt law (*Act of Congress, March 2, 1867*), is inoperative.

The United States law is paramount and exclusive, and suspends the operation of the insolvent laws of this State, over all the cases within its purview.

But it does not suspend those laws which confer upon the State courts the right to discharge the person from imprisonment.

Motion for a perpetual stay

The plaintiff, William Shears, recovered judgment against the defendant, Julius G. Solhinger, from which judgment an appeal was taken to the court at general term.

During the pendency of the appeal, the defendant obtained from one of the justices of the superior court of the city of New York, a discharge under the New York insolvent law, known as the two-third act (3 *Rev. Stat.*, 5 ed., 91), whereby he was discharged from all his debts.

The proceedings for the discharge were commenced since the United States bankrupt act went into operation.

The appeal was not brought on for argument until seven months after the discharge was obtained, and the defendant moved for a perpetual stay upon the judgment.

Shears *v.* Solhinger.

H. Fox, for the motion,—Cited 4 *Wheat.*, 122; 12 *Id.*, 213; 6 *Pet.*, 348, 635; 4 *Am. Law J.*, 333; 14 *Law Rep.*, 451.

E. N. Taft, opposed.

BRADY, J.—The power conferred upon Congress, by the Constitution, to establish a uniform system of bankruptcy throughout the United States, having been exercised by the enactment of a law for that purpose, on March 2, 1867, that law became paramount and exclusive, and suspended the operation of the insolvent laws of this State, over all cases within its purview (*Griswold v. Pratt*, 9 *Metc.*, 16; *Commonwealth v. O'Hara*, 6 *Int. Rev. Reg.*, 125; *Van Nostrand v. Barr*, 2 *Bankr. Reg.*, 154; *Martin v. Berry*, *Id.*, 188; *Exp. Eames*, 2 *Story*, 322; *Bump's L. & Pr. of Bankr.*, 3 ed., 242, and cases cited. See, also, *Sturges v. Crowninshield*, 4 *Wheat.*, 122; and *Ogden v. Saunders*, 12 *Id.*, 213).

The converse of this proposition might lead to conflicts between the State and Federal authorities, in the administration of their powers over the same subject matter, in reference to which both had the right to legislate. The State law yields, therefore. It is not intended herein to declare that the bankrupt act suspends the laws of this State thereto relating, which confer upon our courts the right to discharge the person from imprisonment. The authority still continues.

This is all that I deem it necessary to state in disposing of the question presented on this motion. The subject is attractive, and would doubtless justify an elaborate review; but the cases referred to discuss and dispose of it fully and satisfactorily. The discharge obtained by the defendant is, for these reasons, inoperative. It was applied for and granted subsequently to the act of Congress, and relates to matters within the purview of such act.

Ordered accordingly.

Gregory v. Cryder.

GREGORY *against* CRYDER.

Court of Appeals, November, 1870.

REFERENCE.—ELECTION TO END.

An order denying a motion to set aside an order of reference, after notice of election to end it, upon the referee's failure to report in sixty days after final submission of the cause, is one affecting a substantial right, is interlocutory, and involves no question of discretion. It is, therefore, appealable to the court of appeals.

Any notice distinctly giving the opposite party information that the party serving the notice has elected to end the reference, is sufficient.

After notice of election to end a reference, under § 273 of the Code of Procedure, all subsequent proceedings by or before the referee, are a nullity.

The court has no power to render such proceedings valid by an order enlarging the time for delivering the report, or otherwise.

The omission of counsel to furnish to the referee necessary papers used on the trial, until after the final submission of the cause, does not prevent the running of the time limited for making the decision.

Appeal from an order.

This action was brought by Samuel S. Gregory against Helen C. Cryder. The cause was referred to a referee, and the trial was continued before him from time to time for about two years, and was finally submitted on November 2, 1869. Upon proceeding with his examination of the case, the referee discovered that some exhibits, used in evidence, had not been left with the other papers. He applied to the plaintiff's counsel, who delivered the exhibits to the referee on December 3, 1869.

Subsequently, the referee suggested to the counsel that they should advise their clients to adjust their

Gregory *v.* Cryder.

differences by a compromise, and understanding that the suggestion was accepted by both counsel, he desisted from further examination of the case, until December 29, when he was informed that a compromise could not be effected.

He then resumed his examination, and, on January 4, 1870, defendant's attorney served the following notice upon him and on plaintiff's attorney:

"NEW YORK, January 4th, 1870.

"You will please to take notice that the defendant in this action will proceed therein as if no reference had been ordered therein."

Later, on the same day, plaintiff's attorney served a notice requiring him to make his report, notwithstanding, which he did, and delivered it on January 7, 1870.

The report was in favor of the plaintiff, judgment was entered on the report, and the defendant moved at the special term to have the report set aside, which motion was denied, and the defendant appealed to the general term, where the order denying the motion was affirmed.

An appeal was then taken to this court.

Wheeler H. Peckham and *E. G. Drake, Jr.*, for defendant, appellant.—I. The order is appealable (*Code*, § 11, subd., 4). It affects a substantial right, *i. e.*, the right to a new trial. It is not a question of discretion, but simply of construction of *Code*, § 27. It is an interlocutory proceeding, because a proceeding between the summons and the judgment (*Bouv. Law Dict.*, tit. "*Interlocutory*"). It is a question of practice. Plaintiff was irregular in taking action on the report after the service of the notice.

II. The notice of election to end the reference was sufficient. The form of the notice is not prescribed. It is sufficient if it inform the other side that the defen-

Gregory *v.* Cryder.

dant elects to end the reference. A determination to proceed as if no reference had been ordered is inconsistent with anything but an election to end the reference. Notice of trial at the circuit has been held a sufficient notice of an election to end the reference (*Livingston v. Gidney*, 25 *How. Pr.*, 1; *Niles v. Maynard*, 28 *Id.*, 390, General Term, 5th Dist.).

III. The case was "finally submitted" on November 2. On that day the referee had a right to consider and to *decide the case*. When he had such right the case was "finally submitted." The request for the plans did not reopen the case any more than if the referee had lost them. Nor did the suggestion by the referee, made separately to the attorneys for the respective parties, have that effect. It was extra-judicial; not a proceeding in the cause; and it was declined prior to the expiration of sixty days. Such excuses, in themselves and of their own force, are not effectual to give *jurisdiction* to a referee, which the Code provides that he has lost by the lapse of time and the service of notice. It is the *right* of such party giving the notice so to proceed. And if it be his right, it is then too late to plead excuses which would have been sufficient ground for *extending* the time before the right accrued. Lapse of time and notice given, end the *jurisdiction*. It is like the lapse of four days after submission to a justice of the peace (*Watson v. Davis*, 19 *Wend.*, 371; *Young v. Rummell*, 5 *Hill*, 60; 7 *Id.*, 503). Like a submission to arbitration with a time fixed for making the award (*In re Swinford*, 6 *Maule & S.*, 226; *Mason v. Wallis*, 10 *B. & C.*, 167; 3 *Man. & R.*, 85). The cases reported on this clause are 25 *How. Pr.*, 1, *GOULD*, J., Special Term; *Litch v. Brotherson*, 25 *Id.*, 407, General Term, 4th Dist.; *Foster v. Bryan*, 26 *Id.*, 164, N. Y. Special Term; *Mantles v. Myle*, *Id.*, 409, General Term, 8th Dist.; *Niles v. Maynard*, 28 *Id.*, 390, General Term, 5th Dist.

Gregory *v.* Cryder.

IV. Even if the Court had the power to relieve the referee and the party after *lapse of time and notice given*, it would yet be no defense to this motion. It is a relief needed by the other side, and for which they must make an *affirmative* motion for leave to make and file a report. These excuses are no answer to our motion to set aside a report made without leave. The other side cannot be allowed to be the judge of the sufficiency of their own excuses, and to take the report at their peril.

Henry H. Rice, for plaintiffs, respondents.—I. No notice of the *election to end the reference* has been served; and until such notice is served, the action *cannot* proceed as though no reference had been ordered.

II. The case was not *finally submitted* to the referee until December 3, 1869, when he received the plans and exhibits which were used on the trial. On January 7 following, he made his report. The learned Justice (PRATT), before whom the motion was first made to set aside the report, held, “That a cause cannot be said to have been submitted until *all the evidence used on the trial was submitted*, although the parties supposed it was submitted when summed up.”

III. A final submission of a case is clearly when all the testimony, exhibits, and briefs are handed to and left with the referee, so as to enable him to consider and decide the case. And not until that event happens, can a case be said to be *finally submitted*. The case could never have been decided without them.

IV. Under the amendment requiring a referee to report within sixty days after a case was finally submitted to him, if one of the parties by stipulation, or by any other act, induces the referee to delay the making of his report beyond the sixty days, and during such delay proceeds with the action as if no reference had been ordered, it would be competent for the court,

Gregory *v.* Cryder.

on motion, to prevent such procedure, and allow the report to be made after the sixty days had expired (Supreme Court, 1864, *Niles v. Maynard*, 28 *How. Pr.*, 390). After the plans were submitted, the referee was led to believe that the case would be settled by the parties out of court, and he desisted from the further examination of the case until he was apprised, on December 29, 1869, by the defendant's attorney, that the plaintiff's attorney had informed him that the plaintiff would not make any compromise of the case.

V. This was a waiver by the parties of the right to exact a report within the sixty days. Where the parties have once waived, as by the provisions of the statute they are enabled to do, the right to exact a report within the sixty days, there is nothing within the statute which declares that the report may be set aside, or that any other particular consequence shall result from the failure of the referee to report within the extended time. If the parties surrender the right to require a report within sixty days, they cannot by any stipulation control the action of the referee (*Mantles v. Myle*, 26 *How. Pr.*, 409; *Litch v. Brotherson*, 25 *Id.*, 407).

VI. The amendment of this section was intended to expedite decisions in referred cases, and to enable either party to enforce promptness, but not to take away from parties and the courts the control of the practice in such cases. The delay in this case was not in any sense the fault of the referee, and was not caused by any act of his, and he should not be punished for it, by depriving him of his fees for two years' labor spent in the reference.

VII. If attorneys seek to effect a settlement of case between the parties, during the sixty days, and thereby induce the referee to suspend the consideration of the case in the mean time, in the expectation that it would be compromised, and such compromise falls through, the court will not punish the referee, by set-

Gregory *v.* Cryder.

ting aside his report, and depriving him of his fees, for not making it within the sixty days.

VIII. The court may, in its discretion, under its general power to enlarge the time for doing any act, deny a motion to set aside a report of a referee for being made after the sixty days' limit (*Halsey v. Carter*, 6 *Robt.*, 535; *Clapp v. Graves*, 9 *Abb. Pr.*, 20; *Sheldon v. Wood*, 14 *How. Pr.*, 18; *Litch v. Brotherson*, 25 *Id.*, 407).

IX. The order is not an appealable one. It does not affect a substantial right in the action, and does not in effect determine the action, or prevent a judgment from which an appeal might be taken; neither does it discontinue the action. Judgment has already been entered upon the report of the referee, from which the defendant has appealed to the general term, which appeal is now pending in the second department.

BY THE COURT.—*GROVER, J.*—The order appealed from affected a substantial right, was interlocutory, and involved no question of discretion; it was, therefore, made appealable to this court, by the Code, § 11, as amended in 1870.

Section 273 of the Code, as amended in 1866, among other things, provides that a referee to whom a cause has been referred for trial and determination, shall make and deliver a report within sixty days from the time the action shall be finally submitted to him, and that, in default thereof, and before the report is delivered, either party may serve notice on the opposite party, that he elects to end the reference; and that thereupon the action shall proceed as though no reference had been ordered; and the referee shall not, in such case, be entitled to any fees. A case is finally submitted to a referee when the trial is closed, and the referee is empowered to proceed immediately to consider and determine the case. Within this rule,

Gregory *v.* Cryder.

this case was finally submitted to the referee November 2, 1869. Nothing thereafter remained to be done by either of the parties to authorize the referee to decide the case.

The form of the notice to be served by the party intending to end the reference is not prescribed by statute. Any notice, therefore, distinctly giving the opposite party information that the party serving the notice has elected to end the reference, is sufficient.

The notice served January 4, 1870, by the defendant's attorneys, gave this information. That notice was as follows: "You will please take notice that the defendant in this action will proceed therein as if no reference had been ordered therein." The plaintiff's attorney could not fail to understand from this that the defendant had elected to end the reference.

The sixty days from the final submission of the cause to the referee having elapsed, and no report having been delivered by the referee at the time of the service of this notice, the power of the referee thereafter to make or deliver a report was terminated by such notice.

The subsequent delivery of the report by him was without authority of law and void, as much as the rendition of a judgment by a justice of the peace more than four days after the submission of the case to him.

The judgment entered upon the report would not, like the judgment of the justice, be void, for the reason that it is legally regarded as a judgment rendered by the court; and the court having general jurisdiction to determine the case by final judgment, such judgment, however erroneous, is valid until set aside or reversed.

It is insisted by the respondent that the case should not be regarded as finally submitted November 2, for the reason that it was thereafter discovered by the referee that the plaintiff's counsel had neglected to

Gregory *v.* Cryder.

deliver to and leave with the referee certain exhibits given in evidence by him, and certain calculations made by the counsel, and used by him in summing up the case.

The omission of the counsel to furnish these papers to the referee, did not suspend his power to decide the case, and, consequently, did not prevent the running of the time limited for making the decision.

What was said by the referee to the parties, in regard to settling the case, after its submission to the referee, produced no such effect. When, after the submission of a case, the parties by their act reopen the trial for any purpose, thereby suspending the power of the referee to decide, the time within which the report must be made will commence running when the power of deciding is finally conferred upon the referee.

It is insisted by the counsel for the respondent, that the denial of the motion to set aside the report, should be sustained upon the ground that, in such denial, the court, in the exercise of its discretion, came to the conclusion that it was a proper case to enlarge the time for the referee to deliver his report.

This position cannot be sustained. After the jurisdiction of the referee has ceased by the service of the notice, the order referring, and all subsequent proceedings, are a mere *nullity*, the same as though not existing.

The court has no power to render them valid by an order enlarging the time for delivering the report or otherwise. The statute is that thereupon the action shall proceed as though no reference had been ordered.

Had the court power in any way to prevent the action from so proceeding, it would, when exercised, effect a repeal of the statute. The court has no such power.

In the present case I should have been gratified could I have come to a different conclusion, as the report was, in fact, delivered in a few days after the time limited for that purpose, and the facts furnished a

Cassidy *v.* City of Brooklyn.

good excuse for the delay, if the court had power to excuse it. But the statute is plain in its requirements, and the duty of the court is fairly to apply and carry it into effect.

The order appealed from must be reversed with costs, and an order entered granting the motion of the defendant to set aside the report.

All the judges concurred.

Order reversed, and motion granted with costs.

47 *affirmed*
a.y. 659.

CASSIDY *against* CITY OF BROOKLYN.

Supreme Court, Second District; General Term,
December, 1869.

POWER TO APPOINT CLERK OF COURT.

An act creating a justice's court (2 *Laws* of 1868, p. 1522, ch. 689, § 2) does not, by force of a grant of jurisdiction in civil and criminal cases, confer power to appoint a clerk, especially when the act expressly defines other particulars, such as the qualifications, hours of service, and salary of the justice.

A power conferred upon the common council of Brooklyn, cannot be exercised without the concurrence of the mayor, for, by the charter, the mayor and board of aldermen form the common council.

Motion for judgment.

John Cassidy claimed to recover from the city of Brooklyn compensation for serving as clerk of one of the justices' courts in that city under statutes referred to in the opinion of the court.

It appeared that he was nominated by JAMES LYNCH, the justice of the sixth district, as clerk of the court of

Cassidy *v.* City of Brooklyn.

that district, and that the board of aldermen, to whom the nomination was communicated, approved the appointment by a vote of eighteen in favor of it, and none opposed. The mayor, however, vetoed the appointment.

John G. Schumaker, for the plaintiff.—Reviewed the statutes, and cited, also, 1 *Cranch*, 137; and Achley's Case, 4 *Abb. Pr.*, 35.

Jesse Johnson, for the defendant.—Reviewed the statutes, and cited, as to the principles of interpretation, *People v. Utica Ins. Co.*, 15 *Johns.*, 357, 380; *Jackson v. Collins*, 3 *Cow.*, 89, 96; *People v. Central R. R. Co.*, 13 *N. Y.* [3 *Kern.*], 78.

BY THE COURT.*—*GILBERT, J.*—The act of 1868 (ch. 689, p. 1522, § 2), confers upon the justice to be appointed and elected thereunder, jurisdiction in all civil and criminal cases, and over all persons arrested or charged with any offenses, and all the jurisdiction, power, and authority *in such cases* which were possessed by the justices in said city, then in office; and provides (§ 3) that all laws governing the justices of the peace in said city shall apply to and be binding upon said justice. The act makes no provision for a clerk. The salary of the justice is fixed at five hundred dollars. He must be an attorney of the supreme court. He is required to keep his court open every day from six o'clock P. M. to nine o'clock P. M. only.

By section 1 of ch. 337 of *Laws of 1862*, it was provided that the police justice and the justices of the peace in the city of Brooklyn should each nominate, and, with the consent of the common council, appoint one clerk for each of said courts, and by an act passed

* Present, J. F. BARNARD, GILBERT, and TAPPEN, JJ.

Cassidy *v.* City of Brooklyn.

in 1866 the salaries of such clerks were fixed at twelve hundred dollars per annum.

We are of opinion that no power to nominate or appoint a clerk was granted by the act of 1868. The only grant is contained in section 2, and that is, by its terms, limited to such as may be exercised in *civil and criminal cases*. The provision in section 3 is merely restrictive of this grant. Such was manifestly the intention of the legislature, as shown by the other provisions of the act referred to, fixing the salary of the justice, the period of his daily duty, and specifying his qualifications. If they had intended that the justice should have a clerk, they would have used language expressive of their intent. Not having done so, we cannot extend the statute by construction.

It will be observed, also, that the act of 1862 devolves the power of appointing clerks of justices of the peace upon the common council. Who compose the common council of the city of Brooklyn? The language of the charter is explicit, that the mayor and board of aldermen together shall form the common council, and all ordinances and resolutions passed by the board of aldermen must be presented to the mayor for his approval.

The concurrence of the mayor, therefore, was requisite to a valid appointment (*Achley's Case*, 4 *Abb., Pr.*, 36).

On both these grounds, we think the defendant is entitled to judgment.

Judgment accordingly.

Taylor Will Case.

THE TAYLOR WILL CASE.

*Surrogate's Court, County of New York; Before Hon.
ROBERT C. HUTCHINGS, Surrogate, December, 1870.*

Again, March, 1871; and May, 1871.

PROBATE OF WILL.—ORDER OF PROOF.—EXAMINATION OF PRIVATE PAPERS.—TESTIMONY OF EXPERTS IN HANDWRITING.—PHOTOGRAPHS AS EVIDENCE.—COSTS.

Upon the probate of a will, contested in respect to the genuineness of the paper offered, the testamentary capacity of the decedent, and the freedom of the act, the contestant's evidence as to the genuineness should first be received, and that relating to capacity and undue influence, successively afterward.

It is proper to allow the contestant an examination of private papers of deceased in the administrator's hands, bearing on the personal relations involved in the issues; family letters being first submitted to the court to determine their relevancy, before disclosing their contents by putting them in evidence.*

The proponents of a will are not required, after having made a *prima facie* case, to produce all their cumulative evidence before any evidence has been given by the contestants.

The statute (*Laws* of 1837, ch. 460, § 17) authorizes the surrogate, in his discretion, to require the persons who have had possession of the will since its execution, to be examined; but not the lawyer who drew the will.

The rule that declarations of the testator, made subsequent to the date of execution, are inadmissible, does not justify the exclusion of such declarations, when offered strictly as corroborative evidence in respect to the genuineness of the signature, or the freedom of testator from undue influence, and in rebuttal of contestant's evidence on those points.

* As to the authority of the executor in respect to letters, &c., see *Eyre v. Higbee*, 82 Barb., 502, 507; *Copinger on Copyright*, 24.

Taylor Will Case.

To give weight to the testimony of experts in handwriting against the genuineness of the signature to a will, it must be supported by strong corroborative proof of the mental condition of testator, the physical conditions under which he wrote, the state of bodily health, and the like.

Photographic copies of a signature are not admissible to aid an expert as a basis of opinion as to the genuineness of the original signature. Opinions of those acquainted with the handwriting in question, formed from an examination of photographic copies of the signature, are entitled to but little weight.

Photographs of signatures should not properly be resorted to as a means of evidence, without investigating the refractive power of the lens, the angle at which the original was inclined to the sensitive plate, the accuracy of the focusing, the skill of the operator, and the method of procedure; and if the photograph were an absolutely perfect reproduction of the original signature, there would be no necessity for the study of the reproduction if the original could be produced.

Detection of counterfeits and forgeries distinguished.

An allowance of the costs of contest to an unsuccessful contestant of the probate of a will,—though authorized by the act of 1870, relating to the surrogate's court in the county of New York,—should only be granted in exceptional cases.

Application for probate of a will.

The decedent, James B. Taylor, died August 22, 1870. The paper propounded as his will bore date June 30, 1870. The decedent was a man of business, and left a large property. He had hired a safe in the offices of a safe deposit company, for keeping his valuable papers. No will was there found after his death; but the paper propounded was discovered between the leaves of a book in his library.

The testator had adopted his granddaughter, and the family had been harmonious until the clandestine marriage of the granddaughter in 1869, to Mr. Howland.

The paper propounded gave the bulk of the estate to the widow, the proponent, and five thousand dollars annually to the granddaughter, the contestant.

Taylor Will Case.

Probate was contested on the following grounds:

1. That the instrument was not the last will of decedent.
2. That it was not subscribed or signed by him at the end thereof, or at all.
3. That it was not signed by him in the presence of each, or either of the attesting witnesses.
4. That the subscription was not acknowledged to each, or either of the attesting witnesses.
5. That he did not at the time declare the paper to be his last will and testament.
6. That the witnesses did not sign their names at the request of the decedent.
7. That the decedent was not, at the time, of sound mind or memory, or in any respect capable of making a will.
8. That the instrument was obtained, and the execution thereof procured, by fraud and circumvention and undue influence practiced upon decedent by Laura S. Taylor and Albert Day, or one of them, or some other person or persons unknown to contestant.
9. That it was not freely and voluntarily executed or made as the last will of decedent, but that the subscription and publication by him were procured by fraud and coercion exercised upon him by Laura S. Taylor and Albert Day, or one of them, or some other person or persons unknown to contestant.

I. December, 1870. Reception of proof.

On the opening of court on the third hearing, his Honor gave the following directions as to the proper order of proof, and the production of family letters.

HUTCHINGS, Surr.—Before proceeding further in this case, I deem it proper to make a few observations for the guidance of counsel in regard to the order of proofs, &c.

Taylor Will Case.

The evidence offered by the proponents, in the first instance, was sufficient, *prima facie*, to impose on the contestant the burden of overcoming the legal presumption of the validity of the testamentary paper in question, in respect of its execution and authenticity, and the capacity of the testator. One of the alleged grounds of contest is, that the paper offered as the will of the decedent is not a genuine instrument; that it was not, in fact, signed by him; or, in plain words, that it was a forgery. It is obvious, therefore, that the question of genuineness of signature, or, technically, the *factum*, is the primary one on trial before me, and should first be attended to in the order of proofs by the contestant; and it would have been proper, when the defense was opened, for me to have announced,—it being, in the exercise of discretion, undoubtedly in my province to regulate, in a reasonable manner, the order in which I would hear evidence upon the respective issues,—that the contestant should first present, to the extent that was practicable, the adverse testimony proposed to be offered as to the genuineness and authenticity of the document in question. The defense, however, commenced the other day with proofs of the affection of the decedent toward the contestant, his granddaughter, and some other evidence tending to show a less affection, if not unkindness, at several times on the part of the decedent's wife, who is the principal legatee, toward her grandchild. Some letters of the decedent to the contestant, bearing on the first matter, were presented, and since the adjournment her counsel have, as I am informed, availed themselves of an examination of the papers of the deceased, more particularly to discover, and perhaps to offer in evidence here, other letters from the contestant and widow to the decedent. When at the last hearing the counsel for the contestant moved for the privilege of such an examination of letters, &c., in the hands of the special admin-

Taylor Will Case.

istrator, I intended, and still intend, to allow to both parties alike every reasonable opportunity of investigating decedent's papers for the use before me of such letters, particularly, as may be found showing, as it is admissible thus to show, the character of the personal relations of parties, or may be otherwise relevant to the issues under consideration ; but on reflection since the last adjournment, I have concluded to request, and I deem it proper to direct that, as to letters between the deceased and his wife, or between either of them and the contestant, their granddaughter, whether offered in evidence by proponents or contestant, the same should be first presented to the court, the counsel on either side, of course, being allowed their perusal, that I may, by an examination, determine their relevancy and admissibility before and without any other exposure of their contents unless admitted.

This discretion seems justified, if not required, by considerations of the confidence of the marital and other domestic relations ; and I do not doubt the respective counsel will concur with the court in the desire to avoid, as far as may be, consistently with their professional duties to their clients, the publicity of correspondence, which, as between the parties, must have been confidential, or in the interest only of their family relations.

This reference to correspondence, however, I make incidentally to my chief purpose, which is to say that I have concluded, in the exercise of my discretion, to hear and receive, first, such evidence as the contestant has to offer in respect of the execution and authenticity of the instrument in question. The other incidents are secondary in character, and of no importance, except on the assumption of the genuine execution of the paper, with an observance of the statutory requirements.

Next after the question of genuineness of execution, in the proper order of proofs, is that of testamen

Taylor Will Case.

tary capacity, should that be questioned by contestant ; and, after that, the allegation of undue influence, as one of the grounds of contest.

I do not mean that this order of evidence on the part of contestant will be unreasonably enforced, but I request and shall expect its observance as faithfully as may be possible.

The proponents rested after the examination of the subscribing witnesses, but were required by the surrogate to produce the witnesses who had had possession of the will since it left the hands of the testator. Having done this they again rested.

Mr. Clinton contended that the surrogate should direct that the lawyer who drew the will be examined ; and, also that the proponents should be compelled to go on and exhaust their evidence before resting.

THE SURROGATE.—I do not think that what *Mr. Clinton* asks the court to do comes within the statute. In this proceeding the usual *prima facie* case has been made ; the subscribing witnesses to the will having been called, examined and cross-examined as to the execution of the will, and also the person who had possession of the will before it was offered for probate. There are no allegations, supported as yet by affidavits produced by the contestant, and it therefore is not proper to require the proponents to give cumulative evidence in the first instance. The statute (*Laws of 1837*, ch. 460, § 17) leaves it within the discretion of the surrogate to call the person or persons who received the will from the testator, or that had the possession of it at any time before being offered for probate ; but he cannot require the proponents to produce and examine the lawyer who drew the paper. In this case, there is no proof adduced as to who drew the instrument in question. The witness merely said, that he heard some one say

Taylor Will Case.

that he thought it was drawn by a lawyer named Owen. Under these circumstances, there would be no propriety in requiring the proponents to go on and exhaust their case, and certainly not at this stage of the proceedings, when as yet no evidence to prove any fraud has been produced.

During the trial proponent's counsel offered some testimony in regard to conversations by Mr. Taylor, after the date of the contested will, in reference to having made a will.

Contestant's counsel objected to declarations of decedent as being incompetent on an issue of forgery, or simulated hand-writing.

THE SURROGATE.—The opinion of the court of appeals in *Waterman v. Whitney* (11 N. Y. [1 Kern.], 157) discusses the admissibility of declarations of a testator in cases where the validity of a will is disputed on the ground of *fraud* or *duress* in procuring its execution, or *mistake* or some *similar cause*,—aside from the mental weakness of the testator,—and holds that no declarations of the testator himself can be received in evidence, except such as were made at the time of the execution of the will, and are strictly a part of the *res gestæ*; but the applicability of the rule to the case of disputed genuineness of signature seems not to have been considered, or, I believe, even referred to in that decision; and I hardly think such a question could have been in the mind of the court as within the classes of cases mentioned in the opinion. They appear to be cases of disputed validity arising under instruments *recognized as genuine*.

Here, and at this stage of the matter before me, the inquiry involved is: *Is this a genuine signature of the decedent?*

The contestant claims it is not genuine, and has

Taylor Will Case.

offered letters of the decedent to show declarations, and, indeed, they were offered *as declarations*,—made subsequent to the date of the instrument, of such affection towards the contestant, as to be inconsistent, as her counsel claims, with the provisions of the paper in question; and that evidence was, I think, properly received, as well in respect of the question of *genuineness* as that of alleged *undue influence*. It was, doubtless, offered as to both grounds, and, if I remember the other testimony of contestant correctly, I am strongly of the conviction that a fair and proper trial of this cause requires me, on established rules of evidence, to receive such declarations as are offered to be proved, in legitimate rebuttal of the evidence for the contestant; that is, such declarations as were made by the decedent during the short period of his life, after the date of the paper, that he had made a will, with any statement by him of its provisions as correspond with, so as to identify, the paper as the one referred to.

To exclude such declarations would be, as it appears to me, to reject matter, to say the least, clearly *not immaterial* to the principal question I am to determine upon this paper. The evidence should, however, be taken, not as direct proof, but only as corroborative of the testimony of the *factum*.

I do not discover that the decision and reasoning of the court of appeals precludes this view of the matter; neither am I convinced by the case cited from 1 *Lansing* (Johnson *v.* Hicks, 1 *Lans.*, 150), that I ought to exclude the evidence offered.* It will, therefore, be received.

* That case turned on the question of forgery, and in reference to the admissibility of declarations the court held (relying upon Waterman *v.* Whitney, and Jackson *v.* Betts, 6 *Cow.*, 377), that upon the probate, declarations of the testator made before the *factum*, that he intended to give his property to the legatees named in the will, and declarations made by him after the *factum*, that he made such a will,

Taylor Will Case.

II. *March.* Determination of application for probate.

Considerable testimony on the part of experts in handwriting was offered in the course of the trial, and that of the proponent admitted. On this kind of testimony the surrogate in his opinion spoke as follows.

E. W. Stoughton, Rufus F. Andrews, and William H. Anthon, for proponents.

Henry W. Clinton, A. J. Vanderpoel, and D. R. Jaques, for contestant.

HUTCHINGS, Surr.—In the views which I am about to express of the value of this character of testimony on the part of the contestant, I desire to be understood as including that on the part of the proponent.

In forming an estimate of the weight and value to be ascribed to the testimony given by expert witnesses employed for the specific purpose, a brief consideration of its claims to scientific accuracy must be premised.

It cannot be doubted that the evidence of these witnesses was based upon a minute examination of the material submitted to them for an opinion. This is very apparent in the elaborate analysis they have submitted to the court. Every dot and tittle of the signature to the document here propounded as the last will and testament of the decedent, was closely examined, and its characteristics compared with those signatures which both parties claim to be genuine. Not even the most minute changes and differences in the conforma-

and stating who were the witnesses, and where the will was, were not admissible in proof of the execution of the will. But this point does not seem to have received so much consideration as others involved in the case, and the distinction pointed out by the surrogate in the case in the text, does not appear to have been adverted to.

Taylor Will Case.

tion of different letters, or the relations of the various parts to each other, or the peculiar characteristics of the whole, escaped their searching observation. The appliances of photography, by which the minute parts could be magnified, and their appearance, when so enlarged, preserved, were resorted to by one of the experts on the part of the contestants, though the photographs were not admitted by the court in evidence. No means were left untried by which the differences between the signature to the propounded will and the five signatures in the case, as exhibits, could be magnified, and their importance dwelt upon.

The experts examined the curves and angularities of the strokes of the letters, the directions of the slope of the various parts, the amount of pressure exercised upon the down strokes, the point at which it was initiated, and the place it ceased ; the apparent rapidity with which the pen was carried to make the up or hair strokes, their regularity or irregularity, the size of the loops, the relative size of the different letters, and the comparative length of the different signatures. All that ingenuity could invent was resorted to, and the difference between the various signatures was presented in a manner that shows the great study devoted to the elucidation of the subject.

It is the practice of the courts, when it is necessary for their aid, to receive the evidence of men skilled in the various arts and sources of knowledge as experts, to elucidate the general principles or practical data upon which their science or art is based. In this manner chemists, civil engineers, physicians, or the representatives of any vocation or calling may be brought to the witness stand to testify in regard to the facts of their various professions. The chemist, in his particular business, may be asked to state the manner adopted in which poisons can be detected in food or eliminated from the human body. Again, his opinion may be de-

Taylor Will Case.

sired upon the sufficiency of certain procedures to attain certain results. In either case it is necessary to remember that he is guided by common universal laws, known to every chemist, and that his testimony relates to their application. In this manner it is occasionally necessary for a court to require information from a civil engineer. It is the province of this profession to take cognizance of the effects of the elements upon materials used in constructing works ; to know the effect of the tides and of running waters ; to be able to estimate the durability and safety of structures erected in a particular manner, &c. But the value and weight of this kind of testimony are best exemplified in the evidence of physicians, skilled in mental diseases, in cases where the question of responsibility is involved. In these cases an expert can furnish information attainable in no other manner. The causes and progress of the disease, its development and modes of expression, together with the manner of determining its presence, can alone be furnished by those individuals whose profession it is to study and understand the diverse methods in which diseases of the mind and brain can be manifested. For purposes of illustration we will briefly contrast the basis of facts which underlie the testimony of experts in handwriting and experts in mental diseases, and then consider what may be the sources of fallacy, which, if they do not entirely vitiate, yet render the former less reliable than the latter.

The facts which the medical expert is called upon to elucidate are those parts of the common knowledge of his profession which relate to or have a bearing on mental disease. Those general principles which enable him, as a physician, to form a judgment upon particular cases, are explained to the court, and it may be that his professional opinion is solicited as to the bearing and significance of certain matters in evidence. In all cases, it must be borne in mind, the expert merely

Taylor Will Case.

reflects the light of his own calling upon matters which properly come within it. He refers to a series of analogous cases, and he supports himself by the opinions of the recognized standard authors on mental diseases. His opinion is valuable according to his experience and position. And his opinion is moreover supported by the analogy of cases and the agreement of the standard writers on the diseases of mind, that certain acts, characteristics, and appearances of a man whose sanity is disputed, are evidence of a certain disease.

How different is the case with any attempt to found a scientific basis for a system of expert evidence in handwriting will now be evident.

In the testimony of the witnesses called as experts, both on the part of the proponents and contestant, we have an illustration of the manner in which careful and painstaking study will discover alterations and differences imperceptible to the ordinary observer. These differences have been magnified, dwelt upon, and finally collated and submitted as proof of the non-genuineness of the signature "JAMES B. TAYLOR" to the proffered will. It may be well for this court to speak fully and decisively as to the value it is disposed to ascribe to such evidence.

First. This evidence merely traces alterations and differences between the signature to the will and the five other signatures introduced as evidence, no attention being paid to the analogies between the former and the latter, nor to the differences between any two of the five, and none to the attending circumstances and conditions under which they were executed.

Second. These distinctions were to a certain extent drawn from the study of photographic copies of the signature of the will. This the evidence shows, though the court excluded on the trial the use of photographs.

Without commenting on the self-evident fact that a simple mark becomes a legal and valid signature when

Taylor Will Case.

properly witnessed, we will look for a moment at those ordinary every-day occurrences which produce among the daily signatures of any or all of us alterations as great or greater than were discovered between the signature to the propounded will on the one hand, and certain of the exhibits on the other. Where this has been done, it will be seen that no evidence of the nature here presented is entitled to any weight, unless supported by strong corroborative proof.

In the first place, it appears to me that the mental condition of an individual must necessarily have an important influence upon the character of his writing. Instances of this nature are so common as scarcely to need illustration. Imagine a man overwhelmed with grief, or furious with anger, or under the effect of stimulants, attempting to write his name!

The momentary vexations of life are sufficient to produce appreciable alterations, while even such commonplace occurrences as the pressure of business or the state of the weather are not without influence. Taking, for example, the theory of the contestant (though not at this time passing on the fact), that the signature to the will is written with more steadiness and regularity than the five signatures which are in evidence as exhibits in the case (one is an indorsement on a promissory note, and the other four letters to his granddaughter when in Europe), may not this be considered as an evidence of the effect of mental condition upon handwriting? Is it improbable that a man of Mr. Taylor's years who, so far as it appears from any evidence, had never before affixed his signature to so solemn a document as a will, an act which brought vividly before him, as it brings to all men, the certainty of death, and that death is necessary to ratify the decrees therein expressed, should write that signature with more deliberation than the many signatures which

Taylor Will Case.

he was in the habit of hastily and automatically affixing to checks, notes, letters, bills, &c. ?

Of equal importance are the physical circumstances surrounding an individual ; the height of the table at which he sits, the differences between sitting and standing, when he has to write in a posture to which he is unaccustomed, the flexibility and peculiar character of the pen or quill, the kind of ink, and the substance supporting the paper. A trial will speedily convince any one of the radical differences perceptible between two successive signatures when the only circumstance altered has been to write one on marble and the other on cloth ; or when the difference is in the kind of paper —those accustomed to ruled paper may write badly on unruled—and the same may be said as to the peculiar quality of the paper, whether sized or unsized, the amount of light in the room, &c.

The circumstances affecting handwriting are almost numberless. The state of bodily health is another point. A natural condition of the parts of the body used in writing are of prime importance. A trifling blow on the arm, the effects of a slight fall, a rheumatic or neuralgic pang, or a gouty twinge may either completely annul or greatly modify the power and facility of writing.

Any one of these circumstances may completely vitiate all the learned disquisitions of these experts on what should be the exact uniformity of hairstrokes, base lines, loops and slopes.

A moment's reflection will show how competent any one of the above circumstances may be to produce alterations in the handwriting which can be rendered apparent by a rapid scrutiny, such as was bestowed on Mr. TAYLOR's signature ; and in this connection I may observe that, according to the testimony of one of the witnesses, Mr. Taylor suffered in his shoulder and

Taylor Will Case.

hands from a rheumatic ailment; a fact not known to the experts examined.

The fact that such differences were discovered by these experts will lose any significance when it is considered that the process they employed will produce like results when applied to several copies of almost any signature, provided they were made at different times and under different circumstances.

Are these witnesses who call themselves experts properly entitled to the appellation? They claim to have made the question of handwriting a specialty and profession, and it is contended that they are as properly experts as those in chemistry and diseases of the mind. How true this is can be seen when we reflect that it is not the mere profession and assumption of special knowledge, it matters not how such professions and assumptions are put forward, which entitle any individual to be considered an authority upon any point. The chemist who searches the viscera of a human being who has died with the symptoms of poisoning, looks for a substance which all chemists agree is detrimental to the human body, and acts in a certain manner. In his mode of procedure he is sustained by all of his profession, any one of whom knows the value and importance of each of his steps. In other words, all his steps are guided by general laws, the common property of all chemists.

When his investigations have been pursued to a successful termination, and he has found the poisonous substance, he can demonstrate not only the steps of his progress, but the ingredients of the substance he has found. The expert in diseases of the mind does not pretend to testify as to the mental condition of an individual unless he has made a personal examination, or in the absence of that, he bases his opinions upon the whole evidence in the case; the language, acts, and physical appearance of the person whose sanity is to be

Taylor Will Case.

decided. What does the expert in handwriting profess to do? He has no scientific basis of education, experience, or laws to build on. As in this case, he simply compares one signature with others, and notes some differences, the causes of which he does not attempt to explain, and which from his point of view are entirely unimportant in arriving at the conclusion that the same hand which wrote the signature to the will did not write the other five signatures. He is entirely ignorant how, when, and where those signatures were written; the mental, nervous, or physical condition of the writer; or of any of the influences which practical common sense teaches have an effect on handwriting.

The mental and material influences are unknown to him. In fine, the writer was to him a stranger.

It appears by the evidence of one of the experts, in reply to a question from the court, that the signature to the will is written on a blue-ruled line, while in the cases of four of the exhibits the signatures are written on unruled paper.

How is it possible for them to tell the influence upon a man, with whom they were unacquainted, of being obliged to write his signature on a ruled line, when he may have been accustomed to write on unruled paper, as to its effect upon either rapidity or steadiness of motion? This is one of the many little but important material circumstances which concur to affect the handwriting, and which may be in itself sufficient to destroy all the theories of experts.

Moreover, after a careful consideration of the evidence of these experts, covering several hundred folios, it appears to me that the tendency of their system is so entirely analytical as to weaken, if not to lose the power of generalization.

While successful in pointing out the most minute differences and variations between certain letters and their lines and strokes, they completely fail to take that

Taylor Will Case.

comprehensive view of any of the signatures in question which is so apparent to a practical man. It appears to me that the intuitive generalization made by any one of the witnesses speaking from personal knowledge of the handwriting of Mr. Taylor, either on the part of the proponent or contestant, is of more valuable assistance in the investigation as to the genuineness of the signature to the document here propounded, than either of the two experts called for the contestant, or of the expert called on the part of the proponent.

One of the experts called by the contestant, Albert S. Southworth, stated that his business was the examination of disputed handwriting; and that his business had been also photography, and that he used that art in his examinations.

This witness was asked to look at an exhibit which was marked for "identification," and to say whether the name "James B. Taylor" was a correct photographic copy of the signature of the alleged will. The answer to this question was excluded by the court for the following reasons, as expressed on the trial:

"The original signature to the alleged will has been presented to the witness, and he has examined it and compared it with the exhibits properly in evidence. That is the best evidence to be had, and he can speak from that. I shall exclude all testimony drawn from photographs, as being inadmissible, upon the question of handwriting. Such evidence would raise many collateral issues, as, for instance, the correctness of the lens, the state of the weather, the skill of the operator, the color of the impression, purity of the chemicals, and other issues, which I think clearly require me to exclude such photographic evidence upon this question of genuineness of signature. It is, at best, secondary evidence."

I shall consider the value of testimony based on photographic copies hereafter, in the consideration of the tes-

Taylor Will Case.

timony of those witnesses, on the part of the contestant, whose opinions, given on the trial, were assisted, even if not positively formed, by photographic copies of different specimens of decedent's handwriting, including signatures of different sizes.

[The learned surrogate then reviewed the conflicting testimony as to the genuineness of the signature to the will, an equal number of witnesses being examined on the side of contestant and of proponent. He then proceeded to consider the admissibility and value of photographs in evidence, in the following language.]

This is a summary of all the testimony of the witnesses on both sides who speak from personal knowledge of the handwriting and signature of the decedent, being thirteen in number for the contestant and the same number for proponents ; but I notice particularly that all the former expressed opinions which were founded, more or less, on a previous examination of what purported to be photographs of the signature to the will, and of other assumed signatures of the decedent, and so photographed in different sizes.

It is, therefore, important to consider the use of these purported photographic reproductions of the signatures of Mr. Taylor, though excluded so far as they were offered to assist the expert, Southworth, in his examination, as they were used as a means of comparison by all of the witnesses but one on the part of the contestant, who testified from personal knowledge of the handwriting and signature of the decedent that the signature to the propounded will was not, in their opinion, genuine.

From the accurate study of them it must be evident from the testimony that two of the witnesses, Mr. Marsh and Mr. Van Vechten, changed their opinion as to the genuineness of the signature to the will. It is also evident from the testimony that from the study or examination of these photographs, as presented to them

Taylor Will Case.

by the counsel for the contestant, the data were furnished from which their opinions were prepared. The lines and loops, the strokes and angles that they dwelt upon were observed, measured, magnified, and noted in the photographic copies submitted to them by the counsel for the contestant.

The same objections which may be urged against the admission of these photographs in evidence hold good against the value of the opinions and deductions formed from their study. Too many collateral issues are involved to render them reliable testimony. Those who are familiar with the details of photography are aware of the many circumstances that would have to be made subjects of affirmative proof, and will readily appreciate this statement.

The refractive power of the lens, the angle at which the original to be copied was inclined to the sensitive plate, the accuracy of the focusing, and the skill of the operator, and the method of procedure, would have to be investigated to insure the evidence as certain. The court would be obliged to suspend its examination as to the question of the genuineness of the signature, which is before it, and which is the primary evidence, to listen to conflicting testimony of the proponent and contestant as to who exhibits the most skill and perfectness in their photographic reproductions, and in fact to inquire into the whole science of photography.

When we reflect that by placing the original to be copied obliquely to the sensitive plate, the portion nearest to the plate may be distorted by being enlarged, and that the portion furthest from the plate must be correspondingly decreased, while the slightest bulging of the paper upon which the signature is printed may make a part blurred, and not sharply defined, we can form some idea of the fallacies to which this subject is liable.

Moreover, I cannot see, even if there be no possibility

Taylor Will Case.

of variations in the photographic reproduction from the original, what material assistance photography can be in this case. It is not claimed that the signature is traced over another signature, but that it differs. If it differs from the signatures which are exhibits in the case, it speaks for itself. It is not claimed that any man always writes exactly the same, but on the contrary the experts admit that a man varies in his signature in minute points, though the characteristics are always the same.

If the characteristics are the same, they should be apparent to the ordinary observation—otherwise they can hardly be called practical characteristics. I cannot, therefore, see why photography should have been brought into this case. Its tendency is rather to mislead than to help the witnesses who take these photographs as an assistance; for the reason that they start on the major premise, which is a fallacy, that the photograph of the signature which is alleged to be a forgery must correspond in its minute details with the signatures admitted to be genuine. Upon this premise they build up the differences and deduce the conclusion that the disputed signature does not correspond with the other signatures; a moment's reflection, showing them that no two signatures of the same person are likely to correspond exactly, would convince them of the absurdity of the use of these photographs; as being merely means (provided they are correct) of magnifying the little differences which they could see, primarily, by examining the signatures themselves.

This sort of examination, though it may be useful, provided it be honestly and skillfully applied, to determine the genuineness of a bank-note, is of no avail when applied to handwriting. A forgery cannot be discovered by the same means as a counterfeit. In the latter case, where all the lines and impressions are produced by machinery always acting in the same way,

Taylor Will Case

exercising the same amount of pressure on each occasion, and producing results which are mathematically alike, we have no comparison with the peculiar and in many respects unique process of handwriting.

In the former case we may resort to magnifying glasses and measuring scales with some hope of achieving satisfactory results ; in the latter case we can only appeal to personal knowledge of the individual's handwriting, and even that is dependent upon his physical and mental condition at the time, and the circumstances of the occasion.

Nor is it claimed, as I have stated, that the signature which is disputed is a signature traced over another, so as to agree mathematically, but on the contrary it is claimed that it varies from the other signatures.

The signature to the will is the primary subject of evidence. It is the only proper evidence from which to judge. Men are governed in their opinion of handwriting by the handwriting itself.

In what manner can photography make the signature, in any practical sense, more apparent to the observer than the signature itself ?

The operator may, moreover, through fraud or skill, make some particular lines in the reproduced signature stand forth more prominently than in the original signature.

If the photograph be an absolutely perfect reproduction of the original signature—the former being the same as the latter—there can be no necessity for the study of the reproduction.

If, through the fraud or skill of the operator, some lines be brought out with undue prominence, then it should not be considered proper evidence on which to base an opinion, for it is not a correct reproduction. If, through the choice of the operator, he reproduces it on paper of such shade as to bring forth prominently certain lines, it certainly is not a proper basis for the or-

Taylor Will Case.

dinary witness to form an opinion, who judges from a personal knowledge of the handwriting of the decedent, written, as all the exhibits show, on ordinary paper. But it is claimed that by photography we can magnify and bring out prominently the minute differences. But no man forms his opinion of another's handwriting from those characters which it is necessary to use a glass to make apparent. It does not appear that Mr. Marsh or Mr. Van Vechten, or any of contestant's witnesses, had Mr. Taylor's signatures on notes, letters and documents with which they were thoroughly acquainted, either photographed or magnified.

They were acquainted with his natural signature.

Besides, is it not probable that any man whose signature is subjected to the process of photography, having such different reproductions presented to him, would be unsettled in his own belief as to its genuineness, if he had not been present at the experiments practised on it?

If photographs are properly excluded, for the reasons which I have given, as unnecessary, when the signature claimed to be a forgery is itself in evidence, then the opinions drawn from the study of those must be weakened. In the case of Mr. Van Vechten and Mr. Marsh, after their examination of the will in the surrogate's office, they pronounced the signature to be that of Mr. Taylor; but when they were presented by the counsel for the contestant with the photographs, and had their attention called to various points, they changed their opinion, and pronounced it not to be like Mr. Taylor's signature.

[The learned surrogate then reviewed at length the testimony of the subscribing witnesses, the testimony referring to a previous will, and that bearing on the domestic relations of the decedent and the contestant.

In relation to the declarations of the decedent his opinion was as follows:]

Taylor Will Case.

Upon the proofs already adverted to,—if not otherwise overcome,—I should be compelled to regard the admissibility of the instrument in question to probate, as fully established ; and it only remains, now, for me to consider the value, force, and effect of the evidence of the contestant, offered as showing or tending to show that the instrument is wholly inconsistent with the affection, acts, and declarations of the decedent towards, or in respect of, his granddaughter ; and if so wholly inconsistent I am asked to decide that the paper is not genuine, and that the subscribing witnesses have committed willful and corrupt perjury, besides being accessory to the crime of forgery.

It is obvious that evidence of that character must be overwhelming, in order to impeach the genuineness of an instrument, supported by such positive testimony as I have before me.

A somewhat wider range of inquiry was allowed to the contestant in her proofs, in these respects, than now appears to have been necessary ; but, at the time, I did not feel justified in confining counsel to such narrow or rigorous limitations, as might exclude testimony bearing on the possibility of the execution of a will in 1867, like the unexecuted paper prepared by Mr. Marsh, and found in the desk of the decedent (and by Mr. Marsh identified as the very paper that came from his office with the date of July 12, 1867, inserted, ready for execution),—and which might thus prove an executed, and not merely contemplated, testamentary purpose, more favorable in its terms to the contestant than the instrument now in question ; but the evidence presents no ground for believing that a will like the paper drawn by Mr. Marsh in 1867, was ever executed, and, not having been done, it is to be regarded as only expressing a purpose and disposition he then entertained, but afterwards held in suspense, and I must hold it to have been finally abandoned ; and it is, there-

Taylor Will Case.

fore, now to be considered like any other declarations of the decedent, made three years before the date of the propounded instrument, and indicating more liberal views of the disposition of his property towards his granddaughter; though as of little controlling weight, in the scale of evidence, compared with acts and declarations three years later, after the event of his granddaughter's marriage, and under the other circumstances proved in this case.

Notwithstanding a very considerable degree of latitude was allowed to the *contestant* in her proofs of the decedent's declarations of intention to make a different disposition of his property in case of his death,—but, it appears, never executed by will,—embracing declarations as long ago as 1867, and offered in connection with the paper so drawn by Mr. Marsh, as tending to show that one like it had been consummated—I yet limited the *proponents* in their offers of declarations of the decedent, as to his making or having made a will (in rebuttal of the allegation of forgery of the propounded paper), to declarations made by the decedent, *after* the date of the paper now in question, that he had made a will, with any statements by him of any of its provisions corresponding with, so as to identify, the paper as the one referred to; not to be taken, however, as direct proof, but only as corroborative testimony of the *factum*.

[After commenting upon some of the details of the evidence, on the part of the contestant, the surrogate proceeded as follows.]

On the other hand, the case furnishes the following testimony of declarations of the decedent made *after* the date of the propounded instrument (June 30, 1870), and corroborative of the fact of the existence and execution of such a paper; in my judgment, a class of evidence not only admissible, but of great importance upon the question of *genuineness* of the *factum*,

Taylor Will Case.

when such declarations are proven by intimate and confidential friends who are clear and positive in their statements and conversations, and especially when it appears that they were made under such circumstances as to show that the declarations were earnest and sincere, and could hardly have been misunderstood.

[The learned surrogate then reviewed the testimony of seven witnesses to declarations of testator, which had been admitted under the rule laid down; and finally, upon the whole case, concluded as follows:]

1. That the paper propounded for probate is the last will and testament of the decedent.
2. That it was signed by him on the 30th day of June, 1870, and witnessed, and in all respects, executed according to the requirements of the statute.

It is, therefore, my decree, that the said instrument be admitted to probate as a will of real and personal estate.

Decree accordingly, reserving all questions of costs and allowances.

III. May 1871. Application for costs.

After entry of the decree counsel applied for an allowance of costs, out of the estate, under section 9 of the *Laws of 1870*, ch. 359, p. 826.

Henry L. Clinton and Aaron J. Vanderpoel, for the contestant.

Rufus F. Andrews and E. W. Stoughton, for the proponent.

Mr. Anthon, for Mr. Duryea and Mrs. Weston.

David R. Jaques, special guardian for the contestant.

Taylor Will Case.

HUTCHINGS, Surr.—This is an application by the counsel of the executors and also by the counsel of the granddaughter of the deceased, who contested the probate, for allowances for services on the trial before me as to the validity of the paper which, by the decree of this court, was admitted as the last will of the decedent; therein “reserving all questions of costs and allowances for the further order of the court.”

There is no doubt, under the statute of 1870, relating to this court, of its power to grant allowances. It is, however, a discretionary power which should be exercised with great caution, and this case affords a fitting opportunity to express my views on the subject, inasmuch as the value of the estate is large, and if an allowance to the contestant were to be made, to be adequate, it would necessarily be a very considerable sum; and I deem it important to lay down some general rule on the subject, as there is, undoubtedly, a growing tendency to litigate the admissibility of wills to probate.

Cases, of course, arise in which the execution of such instruments is obtained by interested parties, under circumstances of undue influence on persons of feeble intellect or by fraud, when contests may be very reasonably made, and especially in cases of alleged insanity, when the line between capacity and incapacity is not easily determined; but there seems to be a too-prevailing impression among relatives that unless a testator in his will makes provisions satisfactory to themselves they are warranted in contesting, with the expectation that they are to be indemnified in their expenses out of the estate, even if they fail in their opposition; whereas, it should be understood that the principle which underlies the statute of wills is the right of the testator, provided he is of sound and disposing mind and memory, and the forms of execution are complied with, to make even an arbitrary disposi-

Taylor Will Case.

tion of his property, as it may please himself, to the disinheritance of those who, in case of intestacy, would take his estate; and the power so given must be respected, and the exercise of it enforced by the courts, however repugnant to the general law of descent and distribution of the estates of intestates.

It, therefore, seems to me that in entering upon a contest in a matter of probate, parties should do so in the same manner as in general litigation in other cases in the courts, and that counsel should rely solely upon their retainer and compensation from their clients, and that the clients themselves should, as in other cases, depend on the success of their opposition, subject, of course, to exceptional cases, such as those to which I have referred. Any other rule of conduct of contesting parties, in my judgment, tends not only to encourage unnecessary and groundless litigation in the anticipation of allowances to counsel, but exposes estates to great depreciation and loss on account of the suspension of the powers of executors under wills, during the controversy, in addition to the necessary charges of proponents' counsel and disbursements, in sustaining the probate; and the case before me furnishes an example of such depreciation or liability to loss, as it appears that suits and proceedings of various kinds have been instituted against the estate in consequence of the inability of the executors to qualify and act in the execution of the will, in the payment of promissory notes of the testator to a very large amount, which have matured since his decease, and their inability to avoid, by the payment of interest, the foreclosure of mortgages, while there are also important executory contracts of the testator unfulfilled for the same reason, thus further exposing the estate to the risk of forfeiture or damages.

The case before me does not, in my judgment, come within the exceptional classes of contest to which I have

Taylor Will Case.

referred. There was no question of mental capacity involved, and I may say none of undue influence; for so slight was the evidence offered as to the latter, that the contestant's counsel hardly contended at all for it, and finally wholly abandoned it. Indeed, no other ground of opposition was strenuously adhered to, than the claim of non-genuineness, which was supported by opinions of some witnesses against the positive testimony of unimpeached subscribing witnesses to the will, and other positive proofs of such a character as to be, according to my judgment, overwhelming.

The whole evidence in the case, I think, shows that contestant's counsel depended, really, on the radical idea that the will offered could not be genuine, because its provisions were unnatural; which I regard as an unsound theory, as the principal legatee had been his wife for nearly half a century, and the contestant herself was given an annuity of five thousand dollars during her life; and my experience in this court enables me to say that almost daily there are admitted to probate unquestioned wills, giving entire estates absolutely to widows, even where there are children surviving; and in this case, the only descendant being his grandchild, the contestant, there was no practical disinheritance, since the estate was not diverted from the family, but left the grandchild a liberal allowance annually, with a reasonable expectation, as I must suppose, that the grandmother, as the surviving custodian of the estate, would do by her as her grandfather would, if living, as the former was left with the power of free disposition; and there appears not only to have been no disaffection, but, on the contrary, the strongest ties of affection on the part of the grandmother toward the contestant.

In view of the principles I have stated, and of the facts and circumstances of the case, as developed by the testimony on the trial (which I have reviewed for this purpose), I am unable to discover that there were

Matthews *v.* Wood.

such reasonable grounds of opposition to the will, as to warrant me in ordering the payment of the charges of contestant's counsel out of the estate, and, therefore, I deem it my duty to deny their motion.

As to the application of the counsel for the executors for the payment of their charges out of the estate, considering that the bulk of the estate is left to Laura S. Taylor, the widow of the testator, and who is also an executrix, I shall make such allowance as may have her sanction, subject to my approval; but I cannot make such a direction as to the charges of the counsel for the two legatees, Mr. Duryea and Mrs. Weston.

In regard to the application of David R. Jaques, the special guardian of the contestant, for the payment of a suitable allowance to him for his services, I think it proper to reserve the question until the determination of the pending appeal from my former decree, by the supreme court.

MATTHEWS *against* WOOD.

New York Superior Court; General Term, March, 1871.

APPEAL.—COSTS.

On an appeal from a judgment, after trial by jury, and an appeal from an order denying a motion for a new trial, the New York superior court allow costs of two appeals to be taxed, although both appeals be heard together and on one set of papers.*

It makes no difference that the motion for a new trial was made on the judge's minutes.

* To the same effect is *Ahern v. Standard Life Ins. Co.*, 9 *Abb. Pr. N. S.*, 69. The contrary is held in the supreme court (*Van Alen v. American National Bank, Post*, p. 331).

Matthews *v.* Wood.

Appeal from an order.

The plaintiff, James P. Matthews, recovered judgment against the defendant, Kate Wood, who thereupon moved, upon the judge's minutes, for a new trial, which was denied. She then appealed from the order denying the new trial, and also from the judgment; both were affirmed on the same hearing, and the clerk of the court taxed the costs of two appeals. On appeal from his taxation to the special term, the costs on the appeal from the order denying a new trial were disallowed, and the plaintiff appealed to the general term.

H. K. Coddington, for the plaintiff, appellant.

J. H. Whitelegge, for the defendant, respondent.

BY THE COURT.*—McCUNN, J.—This is an appeal from an order readjusting a bill of costs settled by the clerk. The action was tried before the learned chief justice and a jury. The verdict was for the plaintiff; and immediately after verdict, defendant's counsel moved for a new trial upon the minutes of the court.

This motion was denied. The defendant appealed from the order denying a new trial, and also from the judgment entered on the verdict; and the matter now comes before us on an appeal from the order reducing the clerk's taxation.

The fact that the motion for a new trial was originally made on the judge's minutes, and not on a case, does not alter or affect the costs of the appeal from the order denying the motion. By section 264 of the Code, an appeal from such an order must be heard on a case or exceptions in the usual form. Subdivision 2 of section 349 reads, "When it grants or refuses a new trial," &c. No distinction is anywhere taken as to

* Present, MONELL, P. J., and McCUNN and FREEDMAN, JJ.

Matthews *v.* Wood

how the original motion is to be made, and it must follow that the appeal from the order must be heard the same way and governed by the same rules, whether the original motion was heard on a case or not. It is quite clear that when a motion is heard on the minutes of the judge who tried the case, and decided, and an appeal taken from such decision, a case and exceptions must be settled in the usual form ; and upon that case the argument at general term must be heard. This being so, it certainly must follow that the costs on such an appeal are distinct and separate costs to those allowed on the motion for the new trial on the minutes.

The books abound in cases showing that an appeal from an order denying a new trial is a separate and distinct proceeding from an appeal from a judgment ; the latter presenting for review only questions of law, while the former enables the appellant to obtain a review of the facts as well ; and although in practice the two appeals may be, and usually are, brought to a hearing at the same time and upon one set of papers, they are still none the less *two* appeals, separate and distinct from each other, and presenting different questions to the appellate court for review. It must follow, therefore, if there be two appeals, that there must be separate costs allowed.

The order of the special term must be reversed.

MONELL and FREEDMAN, JJ., concurred.

Order reversed.

Van Alen *v.* American National Bank.

Contra
40. Stom. 190.

VAN ALEN *against* THE AMERICAN NATIONAL BANK.

Supreme Court, First Department, First District;
General Term, June, 1871.

APPEAL.—COSTS.

On an appeal from a judgment and an appeal from an order denying a motion for a new trial, the supreme court does not allow costs of two appeals to be taxed, when both appeals are heard together and on the same set of papers.*

Appeal from an order.

A verdict for the plaintiff, Timothy O. Van Alen, having been rendered in this action, the defendant moved for a new trial on the judge's minutes, which motion was denied.

Judgment was afterward entered on the verdict, and defendant appealed from the judgment, and from the order denying the new trial, by one notice of appeal. The judgment and order were each affirmed at the general term, with costs.

The clerk, on taxation of respondents' costs, allowed, subject to appellant's objection, as costs on affirmance of the order, before argument twenty dollars, and for argument forty dollars, in addition to the same costs allowed on affirmance of the judgment.

The defendant having appealed from the taxation of the clerk, it was ordered, that such taxation of costs be disallowed, and the clerk was directed to allow in

* Otherwise in the New York superior court (see *Matthews v. Wood, Ante*, p. 328).

Van Alen *v.* American National Bank.

lieu thereof ten dollars, as respondent's costs on the affirmation of the order at general term.

From this order the plaintiff appealed to the general term.

Brown, Hall & Vanderpoel, for plaintiff, appellant.—I. Plaintiff is entitled to the items in question as matter of right, under Code, section 307, subdivision 5, alone, which provides, "When allowed, costs *shall* be as follows." Subdivision 5 of the same section fixes the amount of costs as follows: "*To either party on appeal*, except to the court of appeals, and except appeals in the cases mentioned in subdivisions 1, 3, 4 and 5 of section 349, and except in cases mentioned in the second paragraph of section 344, *before argument*, twenty dollars; *for argument*, forty dollars." The costs here claimed by plaintiff arose on an appeal, and that appeal was not one of those excepted.

II. Plaintiff is also entitled to the disputed items under subdivision 2 of section 349, the appeals mentioned in which, not being excepted, are embraced within the provisions of subdivision 5 of section 307 (above quoted). The first clause of section 349 reads as follows: "An appeal may in like manner, and within the same time, be taken from an order made at a special term, by a single judge of the same court or county, or a special county judge, or by a recorder, or by any recorder's court of any city, in any stage of the action, including proceedings supplementary to the execution; and may be thereupon reviewed in the following cases: (1.) (2.) When it grants or refuses a new trial, or when it sustains or overrules a demurrer." We have punctuated the above quotation as we find it in the editions of the annotated Code, from 1864 to 1870; which we submit gives the meaning intended by the legislature. A fanciful interpretation was suggested below, based, we suppose, on the funny

Van Alen *v.* American National Bank.

punctuation of the Session Laws of 1862. For the convenience of the court we quote this part of the section from the Session Laws of 1851 and 1862: 1851. "An appeal may in like manner and within the same time, be taken from an order made at a special term or by a single judge of the same court, or a county or a special county judge, in any stage of the action, including proceedings supplementary to the execution, and may be thereupon reviewed in the following cases :" 1862. "An appeal may in like manner, and within the same time, be taken from an order made at a special term by a single judge of the same court, or county, or a special county judge, "or by a recorder, or by any recorder's court of any city," in any stage of the action, including proceedings supplementary to the execution, and may be thereupon reviewed in the following cases :" The meaning we submit is plain, though the punctuation is erroneous. If we adopt the strained construction suggested by defendant, it implies that the legislature supposed—(1.) That a special term might be held by more than "a single judge." (2.) That the judge or judges holding the special term might be of another court. (3.) Or, indeed, be held by a county or special county judge! "An order made at a special term," and an "order made by a single judge," had each a well defined meaning, and had the legislature meant what defendant claims, it might as well have amplified the reference to the single judge by insisting that he should be a counselor at law, as that a special term should be held by a single judge. See the case of *Ahern v. Standard Life Ins. Co.*, 9 Abb. *Pr. N. S.*, 69, allowing like costs.

Charles H. Woodbury, for defendant, appellant.—The Code (subd. 5, § 307) does not authorize costs before and for argument on appeals from orders denying motions for new trials made upon the judge's min-

Van Alen *v.* American National Bank.

utes. Such costs are allowed by that subdivision only on appeals from orders denying motions for new trial upon a *case made*, which can only be at special term (§ 307, subd. 5). The omission from the exceptions in subdivision 5, section 307, of subdivision 2 of section 349 of the Code, does not help the plaintiff, for the reason that the appeal allowed by subdivision 2 of section 349 is from an order made *at a special term by a single judge of the same court, when it grants or refuses a new trial* (§ 349). The omission of that subdivision from the exceptions in subdivision 5, section 307, was because such costs were expressly granted in the latter part of the same subdivision, and they did not desire to grant the same costs twice (See subd. 5, § 307). There is no comma in section 349, between the words "special term" and the words "by a," as appears in Voorhies' edition of the Code. See *Laws of 1862*, ch. 460, § 22, when the phraseology was changed to what it now is. See certificate of secretary of state presented herewith. Prior to 1862, section 307 excepted all appeals in cases provided by section 349, but authorized appeal costs "as" for a new trial on a case made; which word created diversities of opinion as to such costs. Section 349 at that time authorized appeals from orders denying new trials "made at a special term, or by a single judge." If the same phraseology existed now, the appeal costs would be taxable, because the order denying a new trial, made upon the judge's minutes would be "by a single judge." But in *Laws of 1862*, ch. 460, § 22, that section was changed to what it now is by striking out the comma and the word "or," so that the appeals now authorized by that subdivision are those from orders made at a *special term* by a single judge. By the Constitution of 1846, Art., 6, § 6, special terms might have been held by *one or more* justices, and I suppose that no appeal could have been taken under section 349, if the special

Sexaner *v.* Bowen.

term had been composed of more than one judge. The change made in section 349 by striking out the comma and the word "or," and the change of the word "as" in subdivision 5, section 307 to the word "or," compelled in the latter subdivision the omission from the exceptions from appeal costs, of subdivision 2 of section 349, because appeals allowed by subdivision 2 of section 349 were expressly provided for by the change of the "as" to the word "or" in subdivision 5, section 307. All the cases cited by appellant as to such costs being allowed, are on appeals from orders made at special term on a case made. The appellant having taxed his costs as allowed by the order appealed from, and entered judgment therefor, has lost his right to appeal (Radway *v.* Graham, 4 *Abb. Pr. N. S.*, 468).

BY THE COURT.*—CARDOZO, J.—As there was but one argument on the two appeals in this case, the order allowing single costs only was right, and must be affirmed.

Order affirmed.

SEXANER *against* BOWEN.

New York Common Pleas; General Term, March, 1871.

VERIFICATION.

A verification of an answer, stating that the same "is true, except as to the matters therein stated," &c., is insufficient, and judgment may be entered as upon failure to answer.

* Present, G. G. BARNARD and CARDOZO, J.J. INGRAHAM, P. J., having made the order appealed from, took no part in the decision.

Sexaner *v.* Bowen.

It is not necessary that the precise language of the Code (§ 157), should be used, but the verification must be to the effect that the pleading is true *to the knowledge* of the affiant.

Appeals from three orders refusing to set aside judgments for irregularity.

Three actions were brought, by Louis Sexaner, by Gustavus Petzold, and by Jacob Klaiber, respectively, against the defendant, Henry C. Bowen, who was their employer, to recover balances alleged to be due them, for work, labor, and services.

On the last day to answer, the defendant's attorney served answers of general denial and breach of contract, which were verified as follows:

[*Venue.*]

Henry C. Bowen, being duly sworn, says, that he is the defendant in this action, and that the foregoing answer is true, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[*Jurat.*]

[*Signature.*]

These answers were returned by the plaintiffs' attorney, on the same day, with an indorsement thereon to the effect that the verification was defective; and on the following day he entered judgments as upon failure to answer.

Defendant then moved, at special term, to set aside the judgments for irregularity.

These motions were denied, and the defendant appealed.

C. C. Prentiss, for the defendant, appellant.

George F. Langbein, for the plaintiff, respondent

Sexaner *v.* Bowen.

LOEW, J.*—I think the verification of the answer in each of these cases was insufficient.

The Code, section 157, requires the verification of a pleading, when made by a party to the action, to be to the effect that the same is true *to his knowledge*, except as to those matters stated on information and belief, and that as to those matters he believes it to be true.

It is not necessary that the precise language used in that section should be employed, but it is requisite that the affidavit of verification should be not only to the effect that the pleading is true, but also to the effect that the same is true "*to the knowledge*" of the affiant, (Williams *v.* Riel, 11 *How. Pr.*, 374; Tibballs *v.* Selfridge, 12 *Id.*, 64).

It is urged, that if a pleading contained false statements, an indictment for perjury would lie against the party deposing as well where the affidavit was simply that the same was "true" as where it contained an averment that the same was "true to his knowledge."

However that may be, it is sufficient to know that the Code requires the latter mode of verification, and that if it had no other merit, it would, at least, preclude a party indicted for perjury from asserting or claiming that he was informed and believed that the allegations and matters stated in the pleading were true, and that he therefore thought he would be justified in swearing that it was true.

As the complaints were duly verified, the answers should also have been properly verified, and as such was not the case, the plaintiffs' attorney had a perfect right to return them as he did, and enter up judgments as for want of answers.

It appearing that said judgments were regularly

* Present, DALY, Ch. J., and LOEW and LARREMORE, JJ.

Morning Side Park Case.

entered, the judge at special term was right in denying the motions to set the same aside for irregularity, and the orders appealed from should be affirmed.

CHARLES P. DALY, Ch. J., and LARREMORE, J., concurred.

Orders affirmed.

MORNING SIDE PARK CASE.

Supreme Court, First District; Special Term, December, 1870.

AWARDS.—APPLICATION TO SET ASIDE.

Under the act of 1813 (§ 178, Act of 1813, *Valentine's Laws*, p. 1198), any objection to the awards or assessments of the commissioners in a local assessment in the city of New York, must be made before the confirmation of the commissioners' report.

It seems, that the court has no power to alter the report, it being for the commissioners to alter or correct it in accordance with the directions of the court.

When the report is confirmed, the commissioners are *functi officio*, and a motion to correct the report cannot be granted.

If the owner of land which is taken means to rely on the report as originally prepared, he must see that it is not, at the instance of any subsequent claimant, altered to his prejudice.

The proceedings under the act of 1813 (*supra*) explained.

Motion to set aside an order.

This was a motion made to set aside the order confirming the report of the commissioners of estimate and assessment, appointed on the application of the commissioners of the Central Park, for the opening of the Morning Side Park, so far as it related to the five lots

Morning Side Park Case.

hereinafter mentioned, and which were taken for said park ; and also for an order directing the commissioners to make the awards for those lots to Patrick Callaghan, or unknown owners. The report of the commissioners was confirmed July 28, 1870, and contained awards to Phineas H. Kingsland and Wesley Smith, as the owners of five leases of the lots, executed to them by the mayor, aldermen, and commonalty of the city of New York for the term of a thousand years, in pursuance of sales for unpaid taxes and assessments, and a nominal award of one dollar to Patrick Callaghan, the owner of the fee.

It appeared that the award had first been made, by the commissioners, to Mr. Callaghan, and afterwards changed to unknown owners, and subsequently, when Mr. Kingsland and Mr. Smith presented their claims before the commissioners, they changed the award, and made their report as above stated.

The report, as first made, was examined by Mr. Callaghan, and finding the awards given to him, he went away to California, and he alleged that he had no notice that the awards had been changed.

It also appeared that a Mrs. Currie had, in August, 1870, commenced an action of ejectment, claiming that she was the owner in fee of three of the lots, in which action the mayor, aldermen, &c., Mr. Kingsland, and Patrick Callaghan were made defendants.

T. J. Glover, for Patrick Callaghan.

Henry Parsons, for Mr. Smith.

Abraham R. Lawrence, Jr., for P. H. Kingsland.

David J. Dean, for the mayor, aldermen, &c.

BRADY, J.—The proceedings in reference to improvements under which the assessments and awards

Morning Side Park Case.

were made and imposed in regard to the Morning Side Park are regulated entirely by statute.

It is provided that when the report of the commissioners is presented to this court for confirmation, after hearing any matter which may be alleged against it, it is either to be confirmed or sent back to the commissioners for revisal or correction, or to new commissioners to be appointed by this court, to reconsider the subject matter thereof. And the commissioners to whom the report shall be so referred shall return the same corrected and revised, or a new report to be made by them in the premises, to this court, without unnecessary delay ; and the same, on being returned, shall be confirmed or again referred back as right and justice shall require ; and so from time to time, until a report shall be made or returned in the premises which this court shall confirm ; but such report, when so confirmed, shall be final and conclusive, and the mayor, aldermen, and commonalty, shall become and be seized in fee of all the lands, tenements, and hereditaments in the report mentioned (§ 178, act of 1813, *Valentine's Laws*, p. 1198).

By the provisions of the act of 1862 (*Laws of 1862*, p. 966 ; *Val. Laws*, 1232), it is the duty of the commissioners to deposit with the street commissioner an abstract of their estimate and assessment, at least forty days before their report shall be presented for confirmation. It is also their duty to publish a notice for thirty days in two of the daily newspapers published in this city, stating the intention to present their report for confirmation to this court at a time and place to be specified in the notice, in order that all persons interested in such proceedings, or in any of the lands affected thereby, having objection thereto, shall file the same in writing with the said commissioners within thirty days after the first publication of such notice ; and further, that they will hear such objections within the ten week days

Morning Side Park Case.

next after the expiration of the thirty days during which publication is to be made.

After considering the objections, if any, and making any correction of their estimate or assessments which they shall find to be just and proper, they shall present their report to the court at the time and place specified in the notice already referred to.

It thus appears that the proceedings are regulated by statute, as already suggested, and the power of this court defined.

The report may be sent back as often as this court may deem proper before it is confirmed or new commissioners appointed,—as often as may be deemed just,—in order that the rights of all parties may be protected and a proper report obtained.

It is for the commissioners to make, however, the alterations or corrections, in accordance with the principles laid down by the court for their guidance.

The court cannot make them directly; but if there be any doubt about this proposition, there is no doubt, in my judgment, that the power, if possessed, must be exercised before the report is confirmed.

When it is confirmed, the commissioners no longer exist. The advertisement of the intended presentation of the report of the commissioners and the right, during a period of thirty days, to present objections, which the commissioners must consider and act upon, are designed, not only to give all persons interested in the lands affected the opportunity to guard their interests by calling the attention of the court to the act or omission complained of, but also to advise this court whether, in the performance of their duties, the commissioners have acted illegally or oppressively, or have made a mistake, error or miscalculation, to be shown by the objections presented.

These provisions are full and ample for the object in view, and, by their comprehensive and conservative char-

Morning Side Park Case.

acter, and in the absence of any expression to the contrary, indicate very clearly that it was the intention of the legislature to make the confirmation of the report of the commissioners, as they have declared it shall be, final and conclusive in reference to their proceedings, as between the commonalty of New York and all persons whomsoever in reference to the land taken and the estimate and assessments made and imposed. All persons are thus advised, that, being given the opportunity to be heard, they must appear, and by objection, either to the commissioners or submitted to this court, protect whatever rights are invaded or jeopardized.

The applicant does not seem to have presented any objection either to the commissioners or to the court.

It may be said that the award having been made to him in the first instance, he was justified in relying upon that entry and the abstract of the report; but such a course of conduct was erroneous. The object of the publication of notice would be defeated if the abstract could not be altered, and it was the duty of the applicant to see, if he meant to rely upon it as originally prepared, that it was not, at the instance of any subsequent claimant having even an apparent title, altered to his prejudice.

The alteration or correction may be made according to the statute (*supra*), at any time before the report is presented to the court after publication, and in this case the alteration appears to have been made at the proper time.

There is no evidence of its having been made subsequent to its presentation. Although the report, having been confirmed, is final and conclusive, as already stated, in regard to the estimate and awards, it is not conclusive upon the rights of claimants *inter sese*. The act of 1813 (*supra*), provides that an action may be brought against the person to whom the award was given, after payment thereof to him by the person to

Dreyer *v.* Rauch.

whom, of right, the money paid belonged, notwithstanding such report.

This application must be denied, therefore, upon the ground that the confirmation of the report was final, conclusive, and the end of the proceeding; that the commissioners are *functi officio*, and that this court has not the power to alter the report or send it back to the commissioners for correction.

The applicant is not, however, without remedy. He can by action accomplish the object of this application, and, by the interposition of the equity power of this court, successfully protect his rights, if it be true, as alleged, that the lease executed by the city authorities on the sale for taxes was a nullity.

In the view thus presented of the question involved, it is not necessary to consider whether the commissioners were right in recognizing the lease presented, and changing their award; but, nevertheless, I think it was sufficient to justify them (*Masterson v. Hoyt*, 55 *Barb.*, 520); although, when there are adverse claimants, it is the proper and the better course to award to unknown owners.

Ordered in accordance with the conclusions stated.

DREYER *against* RAUCH.

New York Common Pleas; General Term, March, 1871.

INTERPLEADER.—DISTRICT COURTS.—AFFIDAVIT.

Section 122 of the Code of Procedure, as amended in 1849, giving the right of interpleader, is applicable to actions in the inferior as well as in the higher courts.

Dreyer v. Rauch.

The district courts of the city of New York possess the power to compel adverse claimants of the same money or property to interplead, in a proper case.

It seems, that the affidavit upon which the order of interpleader is based, need not assert ignorance on the part of the defendant of the rights of the respective claimants, but is sufficient if it shows: 1. The existence of an action on contract. 2. Claim of the money or debt involved, by one not a party to the action. 3. Absence of collusion. 4. Indifference to the claims of the contestants. 5. Want of interest in or claim upon the money involved.

Appeal by the plaintiff, Herman Dreyer, from a judgment rendered in one of the district courts.

The defendant, Louis Rauch, being desirous of selling a bakery belonging to him, authorized the plaintiff, Dreyer, the defendant, Frederick Schmitt, and one Christopher Weinz (each of whom was a real estate broker and acting for himself individually), to sell the same, he agreeing to pay to the one who should procure him a satisfactory customer a commission of five per cent.

On or about January 20, 1870, the bakery was sold to one John Rasp, for thirty-five hundred dollars, which was the sum or price at which each of said brokers was authorized to sell the same.

The plaintiff claimed that the purchaser was his customer; that the sale was effected through his agency, and that he, therefore, was entitled to the commission, amounting to one hundred and seventy-five dollars, to recover which he brought this action.

Each of the other two brokers also asserted that Rasp was his customer, and claimed to be entitled to the commission.

The defendant, Schmitt, accordingly brought an action against Rauch in the same court and for the same cause as the plaintiff herein, but the other broker (Weinz) subsequently waived and withdrew his claim.

On the return day of the summons which was is-

Dreyer *v.* Rauch.

sued in this action, the defendant, Rauch, made a motion that he be permitted to pay the amount claimed with interest, costs, &c., into court; that Schmitt be substituted in his place and stead as defendant in the action, and that he (Rauch), be thereupon discharged from liability to either party.

This motion was granted on February 26, 1870, and in pursuance of an order made by the justice, the defendant, Rauch, on the same day, deposited said moneys with the clerk of the court, and the defendant Schmitt was substituted in his place, without any exception on the part of the plaintiff.

The defendant, Schmitt, appeared in the action, and the cause was tried on its merits on March 5, 1870, and on the same day the justice rendered judgment in favor of said Schmitt, whereupon the clerk paid over to him the moneys deposited as aforesaid.

The plaintiff appealed to this court.

George Carpenter, for the plaintiff, appellant.

A. C. Anderson, for the defendant and respondent Rauch.

T. W. Kearney, for the defendant and respondent Schmitt.

LOEW, J.*—By section 8 of the Code, the provisions of that act from sections 69 to 126, both inclusive, are made applicable to actions in all the courts of the State.

That this refers to actions in the district and other inferior courts as well as to those in courts of record, is evident from the fact that the same section declares that the other provisions of the second part of the Code shall relate to actions in the supreme court and

Dreyer *v.* Rauch.

the other courts of record, and also for the reason that in the enumeration of the courts of this State in section 9, the justices' (now district) and other inferior courts are mentioned.

It is quite clear, therefore, that after the passage of the amended Code in 1849, section 122 was applicable to actions in the inferior as well as the higher courts.

If, however, there could be any doubt as to whether the provision in regard to interpleader which was added to that section in 1851, applies to those courts, the same is removed so far as the district courts are concerned by section 48 of the district court act (*Laws of 1857*, ch. 344, § 48).

That section makes section 64 of the Code of Procedure applicable to those courts, and subdivision 15 of the last named section declares that the provisions of that act (*i. e.*, the Code), respecting forms of action, *parties to actions, &c.*, shall apply to said courts.

Now the provisions concerning parties to actions are embraced within sections 111 to 122 of the Code, both inclusive. The district courts, therefore, unquestionably possess the power to compel adverse claimants of the same money or property to interplead if the case be a proper one.

It may, perhaps, be doubtful whether this power of compelling parties to interplead extends to persons residing outside of the respective districts over which these courts have jurisdiction; but as the defendant Schmitt submitted himself to the jurisdiction of the court, and appeared in the action without objection, it is not necessary to express an opinion on that point at present.

The question then arises, was the case under consideration a proper one for the exercise of that power?

I have no hesitation in saying that it was.

The action was brought to recover commissions the amount of which was agreed upon by all parties.

Dreyer *v.* Rauch.

Moreover, each of the claimants insisted that the purchaser was his customer ; that the sale was effected through his individual agency or exertions, and each of them demanded the same sum of money from the defendant Rauch. The latter admitted that he was bound to pay one party or the other, and the only point to be determined was to whom the same was to be paid.

The affidavit of the defendant, Rauch, I have no doubt, was sufficient to confer jurisdiction on the court below to make the order of interpleader.

It showed :

1. That an action upon contract was pending against him, in which issue had not been joined.
2. That a person not a party to the action made a demand of him for the same debt or sum of money.
3. That he was not in collusion with said person.
4. That he was indifferent to the claims of either party ; and
5. That he himself had no interest in, and made no claim upon, the moneys held by him, but was ready and willing to deposit the same in court, to abide the event of the action.

That, I apprehend, was all that the Code required, or was requisite should appear in the affidavit.

But if, as is contended by plaintiff's counsel, and some of the authorities seem to hold, it be necessary for a party to show in addition that he is ignorant of the rights of the respective claimants, and does not know to which he can safely pay the money in his hands, then, in my opinion, that clearly appeared from the facts alleged and averments contained in the affidavit.

I do not know of any case, nor has our attention been called to any, which decides that that must be stated in terms.

Respecting the merits of the case, I am unable to

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

agree with plaintiff's counsel, that the justice erred in deciding that the defendant Schmitt was entitled to the money deposited in court.

Whichever of the two parties was the procuring cause of the sale was entitled to the commission.

It is true, the plaintiff first called the attention of the purchaser to the bakery in question ; but, from the testimony returned to us, it appears that that was all he did. It resulted in no agreement, and the negotiation fell through.

Several months thereafter the defendant Schmitt, without knowing (as appears by his testimony) that Rasp's attention had previously been called to the said bakery, offered the same to him (Rasp), brought him and the seller together, and finally succeeded in effecting a sale.

Under these circumstances I do not see how it can be fairly claimed that the plaintiff found the purchaser, or that he was the procuring cause of the sale.

In my opinion the court below was correct, not only in making the order of interpleader, but also in rendering judgment in favor of the defendant Schmitt, and I think the judgment should be affirmed.

ROBINSON and J. F. DALY, JJ., concurred

Judgment affirmed.

THE CONGRESS AND EMPIRE SPRING CO.
against THE HIGH ROCK CONGRESS
SPRING CO.

Court of Appeals ; April, 1871.

INJUNCTION.—TRADEMARKS.—COMPLAINT.

An injunction lies at the suit of the owner of a peculiar product of

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

nature, to protect him in the exclusive use of a name belonging to it alone, and properly employed by him as his trademark in its sale.*

In the law of trademarks there is no distinction between artificial

* The general principle governing the exclusive use of trademarks, deducible from the authorities, may be concisely stated thus: One who produces, or deals in, articles of a particular class, or conducts a particular business, may appropriate, as a trademark, for the exclusive use of himself, and of his successors in the good will of his trade, any form, symbol or name which has not been appropriated by another, and which designates the origin or ownership of the article, or the identity of his establishment.

But he cannot so appropriate either: 1. A common or proper name already in use and designating the thing or any of its qualities or the use for which it is destined; nor, 2. An arbitrary sign not signifying the origin or ownership; nor, 3. Can he appropriate a name already enjoyed by any other person, firm, or corporation, excepting in those cases where a proper name is adopted in connection with the designation of such articles or establishments, either as a name of fancy, or as the truthful designation of ownership. Nor, lastly, will a mark be protected if it be calculated to deceive the public.

Of the first class of exceptions "Dessicated Codfish" (5 *Abb. Pr. N. S.*, 218), and "Club House Gin" (7 *Bosw.*, 222), are examples. Of the second, letters such as A. C. A., upon the Amoskeag Company's tickings. The third is illustrated by such cases as those of the rival Fabers' pencil makers (49 *Barb.*, 357), the "Akron Cement" (*Id.*, 588); The "Irving House" (3 *Sandf.*, 725); The "Bismark Collar" (4 *Abb. Pr. N. S.*, 410). In reference to rights of personal name, see also *Bining v. Clark* (10 *Abb. Pr. N. S.*, 264).

By the case in the text, the right to an injunction for protection of a trademark for *natural* products, as well as manufactured articles, is established; and in favor of those who become the exclusive owners of the only source thereof, and the business of dealing therein, and who thus are the only persons who can truthfully use the name.

Upon the first point it was previously held that a dealer in manufactured articles is entitled to protection, though he be not the manufacturer (*Taylor v. Carpenter*, 2 *Sandf. Ch.*, 603).

And upon the second, that the right to use a trademark is assignable, even when the mark is a personal one, unless it be so purely personal as to import that the thing is the manufacture of a particular person (*Bury v. Bedford*, 10 *Jur. N. S.*, 503; 33 *L. J. Chan.*, 465; 12

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

products and those which are natural and spontaneous. Where a spring having peculiar medicinal and curative properties, had been known as "The Congress Spring" for more than seventy years, and

W. R., 727; 10 *L. T. N. S.*, 470). In such a case the use by the assignee would be deceptive; and, therefore, would not be protected (*Leather Cloth Co. v. American Leather Co.*, 11 *Jur. N. S.*, 513; 35 *L. J. Chan.*, 53; 13 *W. R.*, 873; 12 *L. T. N. S.*, 742; 11 *H. L. Cas.*, 523).

It will be observed that the opinion puts the plaintiffs' right to use the trademark of their predecessors upon the fact that the plaintiffs bought the spring, and the whole property in it; and thus acquired what was the prime value of it, viz: the exclusive right to bottle and sell the water. That they thus acquired the business of the former proprietors, for, having bought and owning the spring, no one else could carry on the business. That being possessed of the sole right to sell the article to which the trademark had been attached, and no one, not even the former proprietors, being able truthfully to attach that trademark to any article, by operation of law, or by a necessary implication from a sale of the spring, the plaintiffs became possessed of the right to the use of the ancient trademark.

The act of Congress of July 8, 1870, provides a statutory protection for registered trademarks. The following is the form for registration adopted by the Commissioner of Patents.

Form of Deposit of Trademark.

To the Commissioner of Patents:

Your petitioners, Martin Scott and Henry Newman, partners under the firm name of Scott & Newman, residing in Peacedale, Washington County, Rhode Island, and engaged in the manufacture and sale of cotton sheetings at said Peacedale, represent that they have used for ten years last past, are now using, and have the right to use, a trademark for said sheetings, of which the design shown in the annexed drawing is a true copy; which trademark has been printed in blue ink upon the outside of each piece of sheetings. They further represent that no other person, firm, or corporation, has a right to the use of said trademark, or of one substantially the same. They therefore pray that said trademark may be registered and recorded in the patent office, according to law, they having paid into the treasury of the United States the sum of twenty-five dollars, and otherwise complied with the regulations in such case made and provided.

[Signatures of both partners.]

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

that name had never been applied to any other spring or any other water, and no other spring possessed the same qualities;—*Held*, that the words “Congress Water” and “Congress Spring Water,” appropriately indicated the origin of the water flowing from the spring in question; and that the proprietors of the spring had an exclusive right to the use of the word “Congress” as their trademark, in connection with the sale of such water.

A sale of the spring carries to the purchaser the right to use the trademark; and in an action by the purchaser to enjoin third persons from infringing, the complaint need not allege any express assignment of the trademark.

Form of a complaint appropriate to such a case.

Appeal from a judgment of the general term affirming a judgment entered on a report of a referee dismissing the complaint.

The complaint which was dismissed by the referee as not stating a sufficient cause of action, was as follows.

The plaintiffs, after alleging their incorporation, stated that about August 5, 1865, they became the owners of certain real estate in the village of Saratoga Springs upon which exists a mineral spring, discovered about 1792, and which was immediately or shortly thereafter named the Congress Spring, and which has ever since

State of Rhode Island,
County of Washington. } ss.

Martin Scott and Henry Newman, being sworn, make oath and say that the foregoing statement by them subscribed is true in substance and in fact, as they verily believe. [Signatures.]

Sworn to and subscribed before me this 15th day of July, 1870.

[Signature of] Justice of the Peace.

Five duplicate copies of the proposed trademark, in addition to the one accompanying the statement and oath of applicant, must be deposited with each application. Certified copies will be furnished at the usual rates.

Fee on depositing a trademark for registration, twenty-five dollars.

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

continued to be so designated ; that its waters were found to be peculiar to itself, and possessed of highly medicinal and curative qualities. That of the numerous other mineral springs at Saratoga, none possess the peculiar curative properties of the Congress Spring, and none except the said spring were ever called by the name of the Congress Spring, or the waters thereof called Congress water ; that it was early ascertained that the waters of the spring, when bottled, retained their curative qualities for an indefinite period, and that, as early as 1825, the proprietors of Congress Spring had commenced the business of putting up the waters thereof in bottles, and selling the same as Congress water ; and that from that time to the present, the business thus established has continued to be prosecuted by the proprietors of the spring for the time being, until the business has become a very extensive one, and the water of the spring, under the name of Congress water, has become an extensive article of commerce in many countries. That during all this time, the proprietors of the said spring, for the time being, have used in reference to it and its waters, exclusive of all other persons, the names of Congress Spring and Congress Spring Water, until the acts complained of on the part of the defendant.

That from some time prior to 1825, to his death in 1846, John Clarke owned the spring, and part of the time alone, and part of the time in connection with one Lynch, carried on the business of putting up and selling the said Congress water ; that upon the death of John Clarke, the business was continued by his devisees, who became the owners of the spring, under the style of Clarke & Co., until 1852, when one White purchased a part of the said Congress Spring, and the business was conducted in the firm name of Clarke & White, until the spring was sold to the plaintiffs in 1865, who have since continued the business.

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

That from 1825 down, Clarke and his successors in the business had used the words "Congress Water" to denote the waters put up and sold by them, and that these words, followed by the names or initials of the proprietors for the time being, were printed on the inner side of the corks used in bottling the water, and the names of the proprietors were also impressed upon the bottles.

That in carrying on the business of putting up and selling the said water, all the proprietors of the said Congress Spring have been in the habit of purchasing empty bottles which have been used by former proprietors in selling the Congress water, so that each of the successive proprietors of the spring for the time being has used bottles having the proprietary marks of former owners.

The complaint further stated, that the proprietors of the spring have been in the habit of putting up the bottles containing the water in boxes on which were marked with stencil plate on the top, the words, "Congress Water," with the names of the proprietors for the time being, and on the end of each box a notice that corks of all bottles containing the genuine water were branded with the words "Congress Water."

[These marks or labels were set forth in the complaint in the form used by successive proprietors.]

That the plaintiffs invested a large capital in the purchase of the Congress Spring property, and the necessary warehouses and apparatus for bottling the water and preparing it for market, and the business was prosperous and remunerative up to the time of the alleged wrongs on the part of the defendant.

That within a few months, certain parties organized the defendant's corporation, and the defendant, under the name of "High Rock Congress Spring Company" has, since its organization, commenced the preparation for sale, of a medicinal water intended to resemble

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

the Congress water, and the sale thereof as Congress water; that it has prepared a very large quantity thereof, and put up the same in bottles for sale, with marks and inscriptions thereon intended to deceive the public, and to induce the belief that the bottles of water so prepared and sold by it are waters of the said Congress Spring, and thereby to sell the same as Congress water; that it has opened an office for the sale of the same in the city of New York, under the charge of one Thomas J. Clark as its agent, where it is selling the same to persons who wish to purchase Congress water, as the original Congress water from the Congress Spring aforesaid; that among the other devices fraudulently contrived by it, thus to deceive the public, it assumed the corporate name of High Rock Congress Spring Company; uses bottles for putting up the water prepared by it, of a form similar to those" used by the proprietors of Congress Spring, with the words "High Rock Congress Spring Water" impressed thereon: that these words are also printed on the corks, and that like inscriptions are made with stencil plates on the tops and ends of the boxes containing the bottles.

[These marks were set forth in the complaint in the form used.]

That the defendant has prepared a very large quantity of the said mineral water for sale in the manner aforesaid, and by means of the said fraudulent devices, is now imposing upon the public large quantities of a simulated and spurious mineral water prepared by themselves, as the true waters of the Congress Spring, and thereby causing an interference with the sale of the true waters of the Congress Spring by the plaintiff, and depriving it of its just gains on the sale thereof, which, but for the defendant's acts aforesaid, the plaintiff would realize therefrom.

Fac similes of the inscriptions used on the corks, bottles, and boxes, in the sale of the genuine and the

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

spurious Congress water respectively, were also annexed to the complaint, and referred to as exhibits.

The plaintiff thereupon demanded judgment that the defendant be restrained from using any name containing the words Congress Spring Company in the business of preparing, manufacturing, or putting up mineral water for sale; also from using on any bottles, corks, boxes, &c., containing mineral water, prepared or manufactured by the defendant, the words Congress water, or Congress Spring water, either alone or in connection with other words, or any symbol by which in any manner purchasers might be deceived into the supposition that the same was Congress water, and induced to purchase the same as Congress water; also from counterfeiting, or in any manner simulating or imitating any devices hitherto used by the proprietor for the time being, upon the bottles, &c., used in preparing Congress water for market, and from using the same, and from designating the water so prepared or manufactured, "Congress Water," or "Congress Spring Water," either alone or in connection with other words.

That the defendants be compelled to account to the plaintiff for all the mineral water put up and sold by them in violation of the plaintiff's right, and be adjudged to pay the same.

An *ex parte* injunction was obtained by the plaintiffs, and served with the summons and complaint. A motion to dissolve the injunction, based on the complaint, answer, and affidavits, was heard at special term and granted; and on appeal from the order it was affirmed by the general term (57 *Barb.*, 526).

The opinion at special term took the ground that equity will not exercise its power to restrain the use of a trademark, the exclusive right to which is claimed by the plaintiff, unless a good legal title thereto is alleged in the complaint, and the court can see from the plaintiff's own showing that the right which he seeks to

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

have protected clearly belongs to him, and has been infringed. Nor will the court interfere by injunction when such title is alleged, if the right is denied by the defendant, or is rendered doubtful. That the plaintiff did not allege that it had purchased the right to use such trademark, or that the right was assigned to it, and that it could not be inferred from the fact that the plaintiff had purchased the spring that it had also acquired the right to use the trademark. That the word "Congress" indicated neither origin nor ownership, but from long use had come to be merely descriptive of the water.

The order of the special term was affirmed on the last mentioned ground, that the word "Congress" indicated neither origin nor ownership, nor place of the water, but only designated its name, and from long use, its quality—and also on the ground that the water of the Congress Spring being a product of nature, the law of trademarks had no application to protect the owner in the exclusive use of a name given to it.

J. K. Porter and Joseph A. Shoudy, for the appellants.—I. The water of Congress Spring is a well known article of *merchandise*, and has been for more than forty years sold by successive proprietors under the recognized designation and trademark of "Congress Spring Water" and "Congress Water."

II. The court below conceded that the plaintiff, as owner of the spring and proprietor of the water, was entitled to use those words as applicable to the particular article of merchandise in which he dealt, but held it had no exclusive right thereto (see 57 *Barb.*, 526).

III. The court erred in holding that the law makes any distinction between dealers in *manufactured articles* and those dealing in *products of nature*. (1.) It is not claimed that there is any *authority* for such a *distinction* (see opinion below). The principles of the

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

law of trademarks furnish no ground for such a distinction. (2.) So far as they rest on the ground of *protection of dealers*. (3.) Or on the *wrongful and injurious character of the act*. (4.) Nor so far as they rest on the ground of the *protection of the community*. (5.) No such distinction is recognized in the *statute* of New York, making it a misdemeanor to imitate the stamp, brand, or trademark usually affixed to the goods, wares, *merchandise* or *preparation*, of any "mechanic, manufacturer, merchant, or tradesman," with intent to deceive, &c. (*Laws of 1862*, ch. 306, p. 513, 3 *Edm. Stat.*, 672). (6.) None such is recognized in the act of Congress on the subject, which extends to *every class of lawful merchandise* (15 *U. S. Stat. at L.*, 210, ch. 230; *Acts of 1870*, § 77). (7.) If this distinction be sustained, the *preparation* of the waters by bottling would clearly bring it within the law. (8.) The court below erred in supposing that at common law, the law of trademarks extended only to artificial productions. (9.) In the *Plumbago* case, where the plaintiff put up native plumbago in cubical blocks, an injunction to restrain the use of his trademark was allowed (*Dixon Crucible Co. v. Guggenheim*, 2 *Brewster (Penn.)*, 335). To the same effect as to trademarks on *native plumbago*, see cases there cited (p. 341) *Dixon v. Cozzens* (Albany, 1860); *Dixon v. Dixon* (N. Y., 1860); *Dixon v. Wondra* (Boston, Dec., 1862). (10.) So Professor PARSONS says, in an article on trademarks, "The rule appears to be extended to all kinds of property, held by the owner for the use of the public, with compensation to him, and in which there can exist a peculiar and personal right of appropriation" (15 *New Am. Cyclopaedia*, 568). To the same effect, see *London Jurist*, 1850, Part 2, 223. (11.) So, too, in the *Guinea Coal* case, decided in 1870, where the article in which the respective companies dealt was a product of nature, an injunction was granted (*Lee v. Haley*, 39 *Law Jour. Ch.*, 284, 287; *S. C.*,

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

Law Rep., 5 Ch. App., 155). (12.) So, too, in the *Liquorice* case, where the article of merchandise was the natural gum of an Asiatic root, the trademark was protected by injunction in the English court of chancery (*Mc-Andrew v. Bassett*, 10 Jur. N. S., 550). (13.) "Sweet Oppopanax of Mexico," as applied to the product of a Mexican flower, was held a good trademark in *Smith v. Woodruff*, 48 Barb., 438. (14.) Burnt clay is as much a product of nature as bottled mineral water, and in the *Brick* case it was held to be within the law of trademarks (*Dixon v. Fawcus*, 3 *Ellis & E.*, 537; S. C., 107 E. C. L., 535). (15.) This case is within the terms of the statute forbidding the imitation of trademarks (*Laws of 1863*, ch. 209, p. 355).

IV. The court below erred in holding that the trademark was not entitled to protection "because the word *Congress*" (as applied to the spring and water) "neither indicates the origin, ownership, nor place of the water, but only designates its name, and, from long use, its quality." 1. The court was wrong in view of the undisputed facts: (1.) When the proprietors of the spring commenced the business of bottling the water, and used the word "Congress" as a trademark, the spring had been known by that name for thirty-three years. (2.) None of the other mineral springs at Saratoga possessed the peculiar properties of the Congress Spring, nor were they ever known by that name. (3.) The plaintiff's trademark accurately denotes the *origin* of the water. 2. The court erred in view of well settled principles of law: (1.) The words *Congress Spring* and *Congress Water* denote the origin of the waters so marked as clearly as the word *Cocaine* denotes the origin of a preparation made from the cocoa nut (*Burnett v. Phalon*, 9 *Bosw.*, 192; S. C., 3 *Keyes*, 594; 5 *Abb. Pr. N. S.*, 212). (2.) And in the *Liquorice Case* (1864), cited *supra*, the word "*Anatolia*," being the geographical designation of a whole

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

country, was held to be a good trademark, where it was stamped on a stick of liquorice produced there. (3.) To the same effect are *Seixo v. Provezende*, 1 *Ch. App.*, 192; S. C., 12 *Jur. N. S.*, 215; 14 *Law Times N. S.*, 314. 3. The cases cited by the respondent fail to establish any right. *Wolfe v. Goulard* (18 *How. Pr.*, 64) merely decides that the plaintiff could not, in 1848, appropriate the designation "Schiedam Schnapps," such designation having been in common use, as applied to Holland gin, long anterior to 1848. *Burgess v. Burgess* (17 *E. L. & C.*, 257) merely decides that the popular use and *signification* of terms cannot be appropriated. *Amoskeag Co. v. Spear* (2 *Sands.*, 599), when considered as a whole, is against the defendant, and the passing remark of Judge DUER has no application to this case. *Stokes v. Landgraff* (17 *Barb.*, 608) merely decides that words descriptive of quality cannot be monopolized. *Fetridge v. Wells* (13 *How. Pr.*, 385) is an authority for no more than that where a name is false and deceptive, it will not be protected. See *Newman v. Alvord* (49 *Barb.*, 596, 597). *Clark v. Clark* (25 *Barb.*, 76) is flat against the defendant. The only point decided in *Brooklyn White Lead Co. v. Masury* (25 *Barb.*, 416) was that a corporation will be protected against a simulation of its *corporate* and business title. *Merrimack Co. v. Gunn* (4 *E. D. Smith*, 387) simply decides that where there is no simulation, and no attempt to deceive, an injunction will be refused. The following cases are in our favor: *Carter v. Carlile*, 20 *Barb.*, 183; *Glenny v. Smith*, 13 *Law Times*, 13; *Newman v. Alvord*, 49 *Barb.*, 598, 599; *Seixo v. Provezende* (cited *supra*); *Burnett v. Phalon*, 3 *Keyes*, 594; S. C., 5 *Abb. Pr. N. S.*, 212.

W. A. Beach, and Pond & French, for the respondents.—I. The plaintiff has acquired no exclusive right to the use of the claimed trademark. The terms "Con-

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

gress Spring" or "Congress Spring Water," as applied to a natural element, are not applicable as trademarks. *First.* To constitute a private trademark, it must denote either the *origin* or *ownership* of the article to which it is affixed (*Upton on Tradem.*, 86; *Amoskeag Manuf. Co. v. Spear*, 2 *Sandf.*, 599; *Fetridge v. Wells*, 13 *How. Pr.*, 385; *Wolfe v. Goulard*, 18 *Id.*, 61; *Burgess v. Burgess*, 17 *E. L. & E.*, 257). The marks and devices claimed by the plaintiff lack this essential quality. They are simply "used to designate the article itself, and have become, by adoption and use, its proper appellation." The words "Congress Spring" are but the name of the spring itself, and denote the place whence it issues. In this the words are similar to the terms "Avon Springs," "Lebanon Springs," "Sharon Springs," and "Cheltenham Springs," none of which denote origin or ownership. *Second.* Even if it be conceded that the terms used indicate *origin*, the plaintiff is not helped, since the waters of Congress Spring have no peculiar qualities to distinguish it from the numerous fountains in the vicinity. The medicinal qualities of all being the same, the various titles designating them express their common nature, and become common words, which any proprietor is entitled to use (*Fetridge v. Wells*, 13 *How. Pr.*, 385; *Stokes v. Landgraff*, 17 *Barb.*, 608). *Third.* The doctrine of trademarks has never been, and cannot be, applied to the sale of spontaneous natural products of substantially the same nature. It is appropriate only to artificial productions, and is designed to protect inventors and manufacturers, and secure to them the reward of their genius and industry (*Upton on Tradem.*, 97, 98).

II. To justify interference by injunction, the claimed trademark must be deceptively used, so as to mislead ordinary attention (*Partridge v. Menck*, 2 *Sandf. Ch.*, 622; *S. C.*, 2 *Barb. Ch.*, 101; 1 *How. App. Cas.*, 547;

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

Merrimack Manuf. Co. v. Garner, 2 Abb. Pr., 318). Although this rule is against the current of authority in the opinion of Mr. UPTON, who conceives the true rule that an injunction will go, where the party fraudulently uses the trademark in a way to impose on the unwary, though ordinary attention would detect the deceit,—yet the rule first stated is the one in this State until the authority of the court of appeals is reversed.

III. Plaintiff is not entitled to claim the names and marks employed by his predecessor in title. The complaint avers no assignment or purchase of them. It merely avers purchase of the spring. It says nothing of the business or good will.

BY THE COURT.—FOLGER, J.—The questions involved in this appeal are two: 1. Can the owner of a peculiar product of nature be protected in the exclusive use of a name belonging to it alone, and employed by him as his trademark in his sale thereof? 2. Does the name or trademark used in the case before us by the plaintiffs indicate the origin, ownership, or place of that product, and is it one in the exclusive use of which the plaintiffs should be protected?

The general rules of law applicable to these questions do not seem to be controverted. All agree that a name may be used as a trademark, when it is used as indicating the true origin or ownership of the article offered for sale; and that the owner may be protected in its exclusive use, when it is appropriated as designating the true origin or ownership of the article to which it is affixed; and when others may not use it with equal truth, and have not an equal right to employ it for the same purpose. We do not propose to assert in this case any principle which will conflict with these rules.

The case comes before us on an appeal from a judgment sustaining the dismissal of the complaint, made

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

upon the opening of the case for the plaintiffs, with no testimony taken on either side. In this inquiry all of its allegations are to be taken as true. One of them is, that the names "*Congress Spring*" and "*Congress Water*," are, and from 1792, have been, used to designate a particular spring of water at Saratoga Springs, and the flow therefrom possessed of very remarkable medicinal qualities peculiar to itself. Another is, that these names have never been applied to any other spring or any other water, and that no other spring nor any other water possesses these peculiar curative qualities. The full strength of these allegations is, that here is a particular article with valuable qualities of exclusive peculiarity, of which the owners of this spring possess the only source, and which can be had only from them. Still another allegation is that this water, when bottled, preserves all of its qualities, and that it has from 1825 on, become an extensive article of commerce of much profit to the proprietors, and is sought for in the market by these names.

If this water was an artificial compound of worth, of such fame as to be in public demand, and its ingredients and the proportion of their admixture were the result of the study, information and skill of the owner, and known only to him, an imitation of any proper symbol by which he guaranteed to the purchaser the verity and origin of the compound, would be a violation of the rights of both. And why? For that the purchaser has a right to have the very thing which he seeks, and the owner has the right that the very thing sought shall be sold at his profit. It does not alter this right that the compound held for sale, and sought for, is made by nature and not by art. The owner of its sole place of production is the exclusive owner of it in the last case as in the first. And in the last case, as in the first, the buyer seeks that very thing. And both have the right that the truthful symbol or device which tells

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

of the genuineness of its origin shall not be imitated with intent or effect to deceive. It is the peculiarity of the article, its merit which is individual and exclusive, which attracts the buyer. It is the sole power, from having sole control of the place of origin, to furnish this peculiarity, which is the advantage of the owner, and is his property of value. The trademark adopted is the indication to the first of where he may feed his desire, and the protection to the last that he shall keep the profit of being the one who does feed it.

It is true that in most of the cases which have been the occasion of the rules laid down on this subject, the article in question has been artificial. But it will be difficult to show a reason for any of these rules, which does not apply to the proprietorship of a unique product of nature, as well as to that of a unique product of art. If, as has been said, the origin of the right to a trademark is in the sentiment of natural equity, that within certain limits, imposed by law for the benefit of society at large, every one should enjoy an exclusive profit in the result of his powers of invention, ingenuity or skill; that sentiment is as well invoked to protect every one in the enjoyment and profitable use of the property in a peculiar natural product which he has acquired with the avails of his industry, sagacity and enterprise. Sometimes it is said that the essence of the injury is fraud upon the owner, be he the owner who alone can make, or the owner who alone can sell a specific article artificial. It is as much a fraud to injure the owner who has and sells a specific article whose natural source is his alone. The court interferes to protect the plaintiff who has an exclusive right to use any particular mark or symbol in connection with the sale of some commodity. It is because it is his property for the purpose of such application. For the benefit of the vendor the application of

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

the mark or symbol may be as well to a vendible commodity natural as to one artificial ; and thus the vendor of the one equally with the vendor of the other have a right in his mark. In *Amoskeag Manufg. Co. v. Spear* (2 *Sands*. 599), it is said that "every merchant for whom goods are manufactured has an unquestionable right to distinguish the goods he sells by a peculiar mark or device." He has used his capital to buy the exclusive right to vend for his own profit the peculiar product of another's skill. He has devoted and is giving his time, energy, and sagacity to extending the sale of it, with the hope and expectation of that profit. No reason presents itself why he is entitled to protection in the exclusive use of the symbol by which he designates that product of another's skill, more than one who with equal capital, energy, and sagacity, has purchased the sole place of origin of a peculiar product of nature, and is engaged in the sale of it for profit. Both are so entitled.

It is held that the right of property in a trade-mark can be said to exist only, and can be tested only, by its violation. But its violation is when one adopts or imitates, and applies to an article of his manufacture, the name or mark previously used by another as a designation for his production. The wrong done is the sale, by the first, of his goods, as and for the goods of the last. The violation and the wrong are the same, whether the commodity is one which the hand of man has made, or which nature has put into the hand of man. Certainly so, if into the hand of but one man has it been put. It is a matter of property, and the profitable use of property. If one use the name of another for the purpose of securing to himself, in the disposition of property, advantages which belong to that other, the fraud is complete, and the remedy ought to be complete (*Collins Co. v. Cowen*, 3 *Kay & J.*, 428). It cannot make a difference if the property comes by the purchase of its

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

sole place of natural origin, or by the possession of the sole power of producing it by human effort. And in accordance with these views are the following authorities, in which the commodity in question was a simple native product, unaltered by any process of art, in the inherent quality infused by nature which made it desirable to buy and profitable to sell: *Seixo v. Provezende*, 1 *Law Rep.*, 192; *Newman v. Alvord*, 49 *Barb.*, 597; *Dixon Co. v. Guggenheim*, 2 *Brewster (Penn.)*, 335. The first two cases further resemble the one before us, in that the proprietor of the commodity was the owner of the place of its product, and the name of that place was a prominent and controlling part of the trade-mark.

In *Lee v. Haley* (39 *Law Jour. Ch.*, 284; S. C., 5 *Law Rep.*, 155) the plaintiffs were dealers in coal, not claiming that they had an article of specific and peculiar merit, but only that by their care and attention to business, they had secured and attached a set of customers who dealt with and knew them by the business style and address which the defendant had copied. The article dealt in was a natural product, in the general reach of all dealers, acquiring no merit from the manipulation of it by the plaintiffs; and strictly the authority in this connection goes only to the effect that the goodwill of a business represented by a particular style of address, may be protected from the interference of an imitation of that address. Even in that view it would be applicable to the case at hand. But we prefer to place our decision distinctly upon an affirmative answer to the first question above stated.

These names of "Congress Water" and "Congress Spring Water" have, as the complaint alleges, ever since 1825, been used and enjoyed by the proprietors of this spring in reference to it and its waters, exclusive of all other persons; and upon the bottles containing the water, upon the corks of the bottles, and upon the

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

boxes in which the bottles are packed for transportation, have the successive proprietors from that time down, used a form, but slightly varying, of words and letters, as proprietary marks denoting the contents thereof, and under the use of these marks traffic and sale thereof have become profitable, yielding a handsome revenue. Keeping in mind the facts established for the purposes of this case by the allegations of the complaint, that there is but one *Congress Spring*, and but that one spring from which does flow *Congress Water*, exclusively possessed of these peculiar curative medicinal qualities, and there can be no question but that these proprietary marks, adopted and used by the plaintiffs and their predecessors, do indicate the true origin and ownership of this water, and that they have been, and are now appropriated as designating the true origin and ownership of the article to which they are affixed. And whatever may be the counter-allegations of the defendants' answer, and whatever it may be in their power to show upon the trial of an issue, the fact as presented to us by the complaint is, that of the numerous other mineral springs at Saratoga, none of them possess the peculiar curative properties of that owned by the plaintiffs, nor was any of them ever called by the name of *Congress Spring*, or the waters thereof called *Congress water*, so that none other than the plaintiffs may use the proprietary marks adopted by them, upon any article of water but theirs with equal truth, nor has any an equal right to employ these marks. These marks designate the name of the water to which they are applied; they designate not only its general, but its peculiar distinctive and popular quality; and they designate its origin, ownership and place of product. Not merely that it comes from Saratoga, and is of a general character common to all the waters of that place, but that it has a specific and individual

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

character and quality belonging alone to this spring, and which has its origin nowhere else.

By the application of capital, business sagacity and enterprise, this spring and its product have become extensively known and favorably received. That product is sought after and received by this name. It is not to trust to our common apprehension of things to believe that one who wishes for the medicinal water which he has used before, or heard of, as coming from the Congress Spring at Saratoga, does not mean that specific water when he inquires for it by its specific name. And it is this name, the trademark of the plaintiffs, which is the short phrase between buyer and seller which indicates the wish to buy and the power to sell water from that origin, that place, of that ownership. This phrase, this device, is the trademark of the plaintiffs, and is of value to them, as thus designating at once this their own particular article of sale, and guaranteeing the verity of its origin. They have the right to be protected in its exclusive use, for under the facts as shown by the complaint, none other can use it with equal truth, and none other has equal right to employ it for the same purpose.

The exhibits annexed to the complaint tend to show that the defendants are using marks and inscriptions which do resemble in many respects those previously adopted by the plaintiffs and their predecessors, and which in some respects are an imitation not warranted by anything presented to us on the argument or appearing in the papers. The complaint shows the intent of the defendants to deceive the public by certain marks and inscriptions of a form similar to those of the plaintiffs, and to induce the belief by it that the article sold by defendants is the same article as that sold by plaintiffs; and that they are selling the same to persons wishing to buy it, as the original Congress water, from the Congress Spring of the plaintiffs, to the damage of

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

the plaintiffs. It is not necessary for us to examine closely the allegations. This is not a question as to the continuance of an injunction order restraining the defendants, but one whether the plaintiffs shall be allowed to make proof upon the issues raised by the pleadings. We think the allegations for the complaint sufficient for that purpose.

A motion to dismiss a complaint, for that it does not allege facts sufficient to show a cause of action, is in the nature of a demurrer *ore tenus*. And in that view we think the complaint avers sufficient facts to show a cause of action and to permit the plaintiffs to make their proofs.

It is insisted by the learned counsel for the respondents, that the complaint avers no fact which shows that the appellants acquired the right to use the marks and emblems of their predecessors. The complaint avers that the appellants purchased the spring. It does not by any distinct and special allegation aver that they bought the business, or the good will, or the right to use any particular marks or inscriptions, or any of the chattel property connected with or used in the business. The averment that the different proprietors have been in the habit of repurchasing the bottles from consumers of the waters and refilling them, and selling them again thus refilled, does not come up to such an allegation. But the complaint does aver that the spring was sold to the plaintiffs in 1865, and shows what were from that time the marks and words with which they sold. And for the trademark thus adopted they have the right to ask protection. It avers matter which, if proven, tends to establish an interference on the part of the defendants with this trademark, so that if the right to use the trademark of the first and intermediate proprietors and vendors of the water from this spring is not established, the plaintiffs may be able to establish such an imitation of the marks and devices which they have adopted as

Congress & Empire Spring Co. v. High Rock Congress Spring Co.

calls for the interference of the court. Moreover, a property in trademark may be obtained by transfer from him who has made the primary acquisition, though it is essential that the transferee should be possessed of the right either to manufacture or sell the merchandise to which the trademark has been attached (*Upton on Tradem.*, p. 52).

And it may also pass by operation of law to any one who at the same time takes that right (*Dixon Co. v. Guggenheim, supra*; and see *Brooks v. Gibson*, 34 *Beav.*, 566).

The plaintiffs purchased of the former proprietors the spring. They took the whole property in it. They thus obtained that which was the prime value of it, the exclusive right to preserve its water in bottles, as an article of merchandise, and the exclusive right to sell it when bottled. Thus they acquired the business of their predecessors, for, the plaintiffs owning the spring, no one else could carry on the business. And under the rules above stated, they acquired by assignment or operation of law the right to the trademark before that in use to designate the article upon which this business was carried on (see also *Hall v. Burrows*, 10 *Jur. N. S.*, 55).

We are, therefore, of the opinion that plaintiffs should have been allowed to adduce proofs in substantiation of the averments of their complaint.

It follows that the judgment of the courts below should be reversed, and a new trial granted, with costs to abide the event.

All the judges concurred, except ANDREWS, J., who did not sit.

Judgment accordingly.

Paddon *v.* Taylor.

PADDON *against* TAYLOR.

Commission of Appeals, January, 1871.

FRAUDULENT SALES.—BONA FIDE PURCHASE.—CONSIDERATION.

A purchaser of chattels, to whom the seller has delivered them with intent to pass the title, although the purchaser procured the delivery by fraud, can convey a good title to a *bona fide* purchaser for value.*

The surrender by the latter, of the fraudulent purchaser's promissory note, given for money loaned, equal in amount to the value of the chattels sold, is a good consideration, and makes the sale valid against the original seller, within this rule.†

Appeal from a judgment.

This action was brought by John W. Paddon against James C. Taylor.

The complaint alleged that one Hicks, with whom Paddon had had previous dealings, applied to purchase of the plaintiff one hundred and sixty-eight barrels of flour, payable in cash, which were delivered to him. That the purchase was fraudulent. That, immediately afterward, and before payment, Hicks deposited the flour in the warehouse of one Spader, and took from him an acknowledgment of the receipt, from S. F. Taylor, of one hundred barrels, which acknowledgment was marked

* It is otherwise of a purchaser under an executory or conditional contract. In such a case the transfer of possession is not considered a sufficient indication of ownership to protect a *bona fide* purchaser (Ballard *v.* Burgett, 40 N. Y., 314; reversing 47 Barb., 646, and overruling in part Winne *v.* McDonald, 39 N. Y., 233, and Wait *v.* Green, 36 *Id.*, 556).

† So also of the surrender of past due and protested collateral notes of other persons who were insolvent (Park Bank *v.* Watson, 42 N. Y., 490).

Paddon *v.* Taylor.

“not negotiable.” S. F. Taylor was the father and agent of the defendant. That, immediately after obtaining the receipt, Hicks absconded, and that the plaintiff thereupon demanded the flour from Spader, but was refused, and then began an action against Spader to recover the flour. That Hicks had delivered the receipt taken from Spader, to the defendant, for the sole consideration of the surrender of a note made by Hicks in favor of Taylor, for money previously loaned. That Taylor then demanded the flour from Spader, and was refused, and that Taylor then began an action in which Spader was sole defendant, to recover the flour. That the claim of Taylor was the reason that Spader had refused to deliver the flour to plaintiff, and that the claim constituted a cloud on plaintiff’s title. That Spader paid to plaintiff the value of the said one hundred barrels on condition that plaintiff would indemnify him in the suit of Taylor *v.* Spader. That, at the time of this transaction, the action of Taylor *v.* Spader was at issue, and that the plaintiff apprehended that, by reason of the form of the receipt given by Spader to Hicks, and by him transferred to Taylor, and from the fact that Spader was the sole defendant in that action, the plaintiff might be embarrassed in defending in Spader’s name, and precluded from showing Hicks’s fraud and plaintiff’s title to the flour, whereby he would be put to the expense of another action against Taylor, besides being obliged to repay Spader. The complaint closed with a demand for judgment that the certificate of receipt, and all other evidences of title to said flour, should be brought into court, that they might be canceled, and that the defendant might be perpetually enjoined from further prosecution of the action against Spader, and with a demand for further or other relief, &c.

The defendant admitted the allegations of the complaint, so far as they related to the transactions in

Paddon *v.* Taylor.

which he was concerned, and upon trial the court found that the allegations of the complaint, admitted by the answer, were true; and found as matter of law that the defendant was entitled to judgment, and ordered the complaint dismissed.

The plaintiff appealed to the general term, where the judgment was affirmed, and an appeal was taken to this court.

Buckham, Holmes & Bangs, for plaintiff, appellant.

L. A. Fuller, for defendant, respondent;—Relied on *Western Transportation Co. v. Marshall*, 37 *Barb.*, 509, affirmed in 6 *Abb. Pr. N. S.*, 280; and on 6 *Bosw.*, 299; 3 *Duer*, 341; 5 *N. Y. [1 Seld.]*, 41; and as to the consideration, on 33 *Barb.*, 215; 18 *Id.*, 191.

BY THE COURT.—LEONARD, Com.—The plaintiff delivered his flour to a fraudulent purchaser. He voluntarily surrendered his possession under the color of a sale. As between vendor and purchaser, the contract of sale was voidable at the option of the vendor, but it was not void.

The purchaser could sell the flour, and make a valid title as against the plaintiff, to a *bona fide* purchaser; that is, to a purchaser without notice of the fraud by which the flour was purchased from the plaintiff, or reason to suspect it, and who paid a present and sufficient consideration. There was evidence tending to prove that the defendant was such a purchaser, and the fact has been so found, as it must be assumed.

This is conclusive, unless there is some indisputable fact which in law requires a different conclusion.

The plaintiff urges that the defendant did not part with or pay such a consideration as brings him within the class of *bona fide* purchasers entitled to hold

Paddon *v.* Taylor.

against a vendor where the property has been obtained through a fraudulent sale.

The facts in regard to the consideration paid by the defendant, are, that he held the promissory note of the alleged fraudulent purchaser, given to him for money loaned, equal in amount to the value of the flour. He purchased the flour, and gave up the note in payment of the price. This payment made the purchase by the defendant valid against the plaintiff, so far as the consideration bears upon the *bona fide* character of the transaction (Youngs *v.* Lee, 12 N. Y. [2 *Kern.*], 551; Pratt *v.* Coman, 37 N. Y., 440).

The plaintiff relies on the case of Spraight *v.* Hawley, 39 N. Y., 441, and other cases of a like tenor, to establish his right to recover the flour or defeat the title of the defendant.

The cases cited do not cover the principle involved. The mortgagee in the case cited had not voluntarily surrendered his lien, nor put another in possession of the property. Mere possession of personal property is not such indicia of ownership as will protect a *bona fide* purchaser for value.

The possession of an agent or bailee who has no power of sale from the owner, or the possession of a thief, will not enable a purchaser to obtain any title, however fair the price paid, or free from reason to doubt the right of such possessor to make the sale.

The consent of the owner to part with the possession of his merchandise, although fraudulently obtained, enables his vendee to give a good title to a purchaser, who will be entitled to protection, if his transaction is *bona fide*.

The judgment should be affirmed with costs.

All the commissioners concurred, except LOTT, Ch. Com., who did not vote.

Judgment affirmed, with costs.

People *v.* Tinsdale.

PEOPLE *against* TINSDALE.

New York General Sessions, February, 1868. Before Hon. JOHN K. HACKETT, Recorder.

INDICTMENT.—LIABILITY FOR CRUELTY TO ANIMALS.

Form of indictment of driver and conductor on city railroad car, for overdriving and overloading, &c., horses, in violation of the statute against cruelty to animals.

Such driver and conductor are not exempted from liability, because at the time of the commission of the offense they were in the employ of the railroad company, or were acting under its orders.

The commission of the offense under the statute does not rest upon the question of *intent*. The intent is assumed from the act itself.

The conductor of an overloaded car is equally responsible with the driver for the violation of the statute; indeed, more so, as the driver is usually subject to the orders of the conductor.

The law does not limit the number of passengers to be carried.

Whether a car was or was not overloaded, is a question of fact, upon all the evidence, for the jury to determine.

Indictment for a misdemeanor in violating the provisions of 1 *Laws of 1867*, ch. 375, being an "Act for the more effectual prevention of Cruelty to Animals."

The indictment was as follows:

"*City and County of New York, ss.*

"The jurors of the people of the State of New York, in and for the body of the city and county of New York, upon their oath present: That George W. Tinsdale, late of the first ward of the city of New York in the county of New York aforesaid, he then and there being a conductor of a passenger car, on the Bleecker-street and Fulton Ferry Railroad of the city of New York, and Arthur Taggart, late of the same place, he then and there being the driver of said passenger car of said railroad, on the second day of January, in the

People *v.* Tinsdale.

year of our Lord one thousand eight hundred and sixty-eight, at the ward, city and county aforesaid, with force and arms did unnecessarily overload and procure said passenger car to be overloaded, then and there being attached to said passenger car two living creatures, to wit, two horses: by means whereof on a certain portion of the route of the said railroad the horses so attached to said passenger car were unable to draw said passenger car, but were, by reason of the premises aforesaid, overloaded, overdriven, tortured, and tormented; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

“A. OAKY HALL,
“District-Attorney.”

The prisoners were arraigned, pleaded not guilty, and were tried jointly before Hon. JOHN K. HACKETT, Recorder, and a jury, February 7, 1868.

Gunning S. Bedford, Jr., Assistant District-Attorney, for the people.

Charles S. Spencer, for the prisoners.

The facts upon the trial of the case appear in the charge to the jury.

HACKETT, Recorder, charged the jury as follows:

Gentlemen of the Jury :—The statute, for an alleged violation of which the accused are at the bar, was intended and enacted for a wise and beneficial purpose; and that it should only recently have been the subject of legislative action, is a matter of reproach.

No statute determines the limit or number of passengers that may be carried in cars propelled by steam or horse power; and that no such provision of law exists is with many a subject of regret, and it must be

People *v.* Tinsdale.

within your experience, that not an hour or moment of the day passes, but that human beings are packed in cars, and, as alleged, simply for the gain and cupidity of railroad directors and stockholders. If true, they are as much obnoxious to the charge of cruelty to human beings, as the accused now stand charged with inhumanity to dumb animals.

As matter of law, I charge you that no exemption from liability accrues to the accused from the fact developed in this case, that they were then in the employ of a railroad company. The law (1 *Laws of 1867*, ch. 375, § 1, p. 834) plainly recites that "If any person shall overdrive, overload, torture, torment, deprive of necessary sustenance, or unnecessarily or cruelly beat, or needlessly mutilate or kill, or cause or procure to be overdriven, overloaded, tortured, tormented or deprived of necessary sustenance, or to be unnecessarily or cruelly beaten or needlessly mutilated or killed, as aforesaid, any living creature, every such offender shall, for every such offense, be guilty of a misdemeanor." The conductor who has charge of the car, and the driver who drives the horses, whilst in the performance of the several duties allotted to them, are equally responsible for a violation of the law referred to. The law does not make president, directors, or other officers of the company responsible for the acts of their employees, but only those who have charge of the car; which charge is especially given to the conductor on the one hand, and the driver on the other, each having separate and distinct duties. If they, or either, are guilty of a violation of this law, their offense is not extenuated by the fact that they are each acting under orders from superiors. Were I to direct either of you to commit assault and battery on another, and should this direction be followed, you would be responsible. No company can compel their conductor or other employee to do an act which is against the law.

People *v.* Tinsdale.

It follows that there is nothing in the argument of the counsel for the accused, that no crime exists, except there be an intention to transgress. If one commits a murder, it would be absurd to interpose the defense that he did not so intend. If a man overloads a car, beyond the ability of the horses attached to it to draw, he is within the act in question, and guilty of cruelty, and, therefore, responsible. The intention is assumed directly from the act itself.

In the case at bar, although it appears that Mr. Tinsdale was simply the conductor of the car, I charge you that if you find him guilty at all upon the evidence, he (Tinsdale) is just as much responsible and just as much guilty as the driver; in fact, perhaps, more so, for the reason that a driver is usually held in subjection to the orders of the conductor.

I will briefly call your attention to portions of the testimony in this case, which I regard as most material. The police officer (who appears to be perfectly disinterested, and who has been complimented for his fairness by the counsel for the accused), testifies that the car was unusually crowded, that one of the horses slipped twice, and that some of the passengers were compelled to aid the horses in putting the car in motion. If the testimony did not expressly establish the fact, the right belongs to you to infer the fact that without the aid of the passengers and also of the conductor, the car could not have been set in motion. You are to regard all the testimony in determining the question, whether or not the car was overloaded upon the occasion referred to. Mr. Bergh testifies that the car was crowded and was ascending the steepest grade in the city; that the horses attached were light in weight and strength; that they slipped, and one of them fell twice, whilst straining to propel the overloaded car, and were evidently unsuited for such labor. Mr. Bergh further states, that, in his opinion, the car could not have been

People *v.* Tinsdale.

placed in motion without the aid of the passengers and conductor. Mr. Hill, a witness for the defense (a driver by occupation, and on the occasion a passenger upon the car), testifies that the stoppage was occasioned by the passage of a truck in front, and when the horses started, one slipped; but corroborates the statement that the passengers had to aid the horses in their endeavor to start the car. Mr. Morris, a witness for the accused, testified that the record of the passengers disclosed *thirty-two* upon the down trip. His statement is at variance with the testimony of the officer and that of Mr. Bergh. Mr. Hill also testifies that there were no more than thirty-two passengers, and further, that conductors and drivers were not limited as to the number of passengers to be carried. It is to be regretted that such a salutary law does not exist; but the fact that none such existed should not prejudice the accused in your estimation. They should not be held responsive for the wrongs committed by their superiors.

I leave this matter with you. If you believe from the testimony in this case, that, upon the occasion of the arrest of the accused, the one was acting as conductor of the car, and the other as driver; and that such car was overloaded, or laden with passengers in connection with the grade to such an extent as to be beyond the ordinary and proper capacity of the horses attached to it to draw it, then you will find the accused guilty.

A statement has been made by the counsel for the accused, who has so ably defended them, which may have improperly operated upon your minds, to the effect that the penalty upon conviction is a very serious one. With that you have nothing to do. It is within the power of the court, in administering the law, to impose fines, from one cent up to an amount of two hundred and fifty dollars, or imprisonment from one day to one year. In the event of conviction, I shall be

Chesebrough *v.* Tompkins.

guided by my sense of duty ; but neither the extent nor character of the punishment prescribed by law, should affect your minds in considering upon your verdict.

The jury rendered a verdict of "Guilty," against both defendants, and the court thereupon imposed a fine of two hundred and fifty dollars upon each of them.

CHESEBROUGH *against* TOMPKINS.

Court of Appeals, April, 1870.

CASE ON APPEAL.—EVIDENCE.

When, on a trial, defendant's counsel moved to strike out oral evidence, on the ground that it appeared that there was written evidence on the same matter, which plaintiff was bound to produce ; and plaintiff was subsequently nonsuited ; and on appeal to the court of appeals, it did not appear, from the case made, what disposition was made of the motion ;—*Held*, that the court of appeals would, if necessary to sustain the judgment, presume that the motion to strike out was granted.

Appeal from a judgment.

Douglas Chesebrough sued Thomas H. Tompkins and George N. Palmer upon a promissory note made by Tompkins to Palmer's order, and by him transferred.

It was proved on the trial that Tompkins had made the note as payment for some shares in a patented article owned by Palmer, and had given it to one Brown, Palmer's agent, who had indorsed Palmer's name upon it.

Some oral evidence was given as to Brown's authority to take such notes and indorse Palmer's name, when it appeared that there was a writing relating to

Chesebrough *v.* Tompkins.

that subject. Defendant's counsel thereupon called for the writing, and moved that the oral testimony on the question of authority should be stricken out. Pending the decision of the motion, the court nonsuited the plaintiff.

An appeal was taken to the general term, where the judgment was affirmed, and the plaintiff appealed to this court.

J. W. Crane, for plaintiff, appellant.

J. A. Shoudy and *W. A. Beach*, for defendant, respondent.

BY THE COURT.—RAPALLO, J.—The nonsuit was granted on the ground that the plaintiff showed no title to the note. The only witness called to prove the authority of Brown to indorse and transfer the note, was Palmer, the payee.

He testified, in substance, that Brown was authorized by him to sell certain patent rights, and to receive notes in payment, and transfer them so as not to make him (Palmer) liable in any way. On cross-examination, however, he testified that he furnished Brown with printed blank notes, all payable to bearer, to be used in that business; that Brown had authority to take and transfer such notes, and no others; that he had no authority to make notes payable to order, and write Palmer's name upon them. On further cross-examination, it appeared that Brown's authority was in writing.

The writing, though called for, was not produced, and the defendant moved on that ground to strike out the oral evidence which had been given as to Brown's authority.

The case does not disclose what disposition was made of this motion. But inasmuch as the judge nonsuited the plaintiff on the ground of want of title, and held that there was no evidence to submit to the jury

Stockwell *v.* Bates.

on that point, it would, if necessary to support his decision, be intended that he granted the motion to strike out, and regarded the oral evidence of authority as excluded.

In that view of the case, there was no evidence whatever of title to the note, and the nonsuit was properly granted.

The judgment should be affirmed with costs.

Judgment affirmed.

STOCKWELL *against* BATES.

Supreme Court, First Dist.; Special Term, March, 1871.

ACTION AGAINST STATE TREASURER.—ATTACHMENT.

An action against one State, in the courts of another, cannot be sustained by joining, with the State sued, one of its officers, against whom no cause of action exists, and no judgment can be had, in order to attach money of the State within the jurisdiction of the court, and thereby coerce its appearance.

Motion to vacate attachment.

The plaintiff, John C. Stockwell, holding coupons issued by the State of Illinois, and many years overdue, brought an action to recover thereon, naming as defendants, Erastus N. Bates, State treasurer, and the State of Illinois. Certain moneys of the State of Illinois being on deposit in the city of New York, and the treasurer being found here, the summons was served upon the treasurer, and an attachment, issued as a provisional remedy under the Code, was levied on the moneys. The defendant, Bates, now moved to vacate the attachment.

Amos G. Hull, for the plaintiff.

Chapman, Scott & Crowell, for the defendant.

Dale *v.* Jacobs.

CARDOZO, J.—The claim, as was conceded by the plaintiff's counsel, is only against the State of Illinois. There is no cause of action against Mr. Bates. The case is not within the principle of *Osborn v. Bank of the United States* (9 *Wheat.*, 738).

There, an officer of the State was attempting to make a collection which was sought to be restrained. The action could properly be brought against him, although the State was ultimately to be benefited by the money. When an individual is liable to be sued, and a State has any interest in the litigation, it may be made a party, to give it an opportunity to appear, if it chooses; but I find no case which will justify, in a suit against a State, upon a cause of action solely against it, the joinder of a merely nominal party, against whom no cause of action exists, and no judgment can be had, so as to attach money of the State, and thereby coerce its appearance.

I think the attachment must be vacated.

DALE *against* JACOBS

Supreme Court, First District; Special Term, March, 1871.

FRAUDULENT PURCHASE ON CREDIT.—ARREST.

Defendant made a purchase of goods on a short credit of thirty days, and within that time became insolvent, furnishing no explanation of the fact.—*Held*, that it was a fraudulent contracting of the debt, within section 179 of the Code, and an order of arrest consequently must be sustained.

Defendant was arrested in two causes, on the ground that a certain debt due plaintiff had been fraudulently contracted. He now moved to vacate the orders.

Todd *v.* Lambden.

Coudert Brothers, for plaintiff.

Townsend, Levinger & Waldheimer, for defendant.

CARDOZO, J.—I do not think there is any difficulty as to this case. The goods were sold upon a short credit of thirty days, at the end of which defendants claim to be insolvent, but decline to furnish any explanation of their affairs.

Becoming insolvent so soon after the sale, it is not too much, there being no explanation offered, to believe that they were so when they made the purchases, and, if that be so, they fraudulently concealed the fact, intending, when they bought the goods, not to pay for them. That was a fraudulent contracting of the debt (*Nichols v. Michael*, 23 *N. Y.*, 264). I cannot say that the affidavits do not disclose such fact, and the conduct of the defendants has not been such as to justify a jury in finding that the debt was not so contracted.

Motion in both cases denied.

TODD *against* LAMBDEN.

Supreme Court, First District; Special Term, November, 1870.

EXAMINATION BEFORE TRIAL.—SERVICE ON NON-RESIDENT.

Under section 391 of the Code of Procedure,—which allows the court to issue a summons to compel a party to be examined as a witness before trial,—the summons may require attendance in the county where it is issued and served, although the party be a non-resident, only temporarily there.

Summons for examination of party before trial.

This action was brought by James W. Todd against Edward Lambden. The defendant, a resident of New

Todd v. Lambden.

Rochelle, in the county of Westchester, was served in the city of New York on November 16, 1870, with an affidavit, summons and notice to attend for his examination before trial, under section 391 of the Code of Procedure, before one of the judges of the supreme court, at the court-house in the city of New York.

On the return day of the summons the defendant raised the objection that a party could not be compelled to attend for his examination in any other county than that of his residence, and thereupon moved to vacate the summons and notice.

Charles H. Roosevelt, for the motion.

Edward S. Clinch, opposed.

BRADY, J.—Section 391 provides that a party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. I entertain the opinion that the latter alternative was not designed to authorize the examination of a party only temporarily out of his county, but was intended to apply to persons who do business in some county other than that of their residence. The language of the section does not admit, however, of such a construction, and leaves no doubt of the right, in terms, to examine a party wherever he may be served with a summons. He may be called to another county, far distant from his home, by some emergency, and be there served with a summons requiring him to submit to an examination in the absence of his counsel and advisers. I think such a proceeding may always operate with prejudice, and should be corrected either by legislation or rule.

The defendant must appear on November 28, at ten o'clock, to be examined. Notice to be given him by the plaintiff's attorney on or before November 27.

Miller *v.* White.*Revered by*
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*206. 184; 700*MILLER *against* WHITE.

Supreme Court, Second Department, Second District;
General Term, January, 1871.

**LIABILITY OF TRUSTEES FOR CORPORATE DEBTS.—
JUDGMENT ROLL AS EVIDENCE.—FILING
OF CORPORATE REPORTS.**

It is a settled principle that a creditor, having once established his claim against a corporation, by judgment, shall not be compelled, in seeking a remedy thereon against stockholders or trustees, to establish the fact of the original indebtedness of the corporation.

The judgment may be impeached for fraud or collusion, but not otherwise.

It is not error to admit plaintiff's testimony on matters not embraced in the complaint, but distinctly presented as a defense by the answer, and controverted by the reply.

Where the defendant appears and answers, the omission of the clerk of the court to annex the summons to the judgment roll, does not affect the validity of the judgment, nor the admissibility of the judgment roll in evidence, in another action.

Testimony, on the part of a corporation, going to show the preparation of a report, and its delivery to one of the corporation's officers to file, does not meet the fact of failure to file, established by testimony of a proper search in the office of the county clerk, and is not sufficient proof to go to a jury, as to whether the report was, in fact, filed.

Appeal from a judgment.

This action was brought by George W. Miller against John P. White and others, to recover from them, as trustees of the Gutta Percha Manufacturing Co., a debt due from that corporation which had been established by judgment obtained on a trial in a previous action against the corporation, for commissions on

Miller *v.* White.

sales made for the company, in pursuance of a contract made August 1, 1863.

Execution on the judgment had been returned unsatisfied, and the plaintiff brought this action as shown in the opinion.

This is the second time the case has come before this court. The former decision is reported in 8 *Abb. Pr. N. S.*, 46.

The fifth and sixth requests to charge, referred to in the opinion, are as follows:

"5th. That no verdict can be rendered against these defendants except for such indebtedness as existed on February 16, 1865, or prior thereto.

"6th. That it is proved that no indebtedness for commissions under the contract of August 1, 1863, existed until April 15, 1865, and, therefore, the defendants are not jointly liable for this commission."

The court refused so to charge, and counsel excepted.

The facts, further than this, appear in the opinion of the court.

Sheldon & Brown, for defendant and appellant White.

J. Johnson, for defendant and appellant Lazell.

L. A. Fuller, for plaintiff, respondent.

BY THE COURT.*—TAPPEN, J.—The plaintiff recovered a judgment against the Gutta Percha Manufacturing Company, for the sum of twenty-four thousand seven hundred and thirty-four dollars and sixty-two cents, June 27, 1866; and, the same being unpaid, after execution issued and returned wholly unsatisfied, the plaintiff brings this action against the defendants,

* Present, J. F. BARNARD, P. J., and GILBERT and TAPPEN, JJ.

Miller *v.* White.

alleging that they were trustees of the company, and that the company neglected to file an annual report, as required by the general act of February 17, 1848, and the acts amendatory thereof, and that, therefore, by force of the statute (§ 12) the trustees became personally liable for the debts of the company then existing, and for all debts contracted prior to the making of such report (*Laws of 1848*, p. 54, ch. 40, § 12).

It has been held that only those who are trustees when the debts are contracted, come within these terms (*Shaler & Hall Quarry Co. v. Bliss*, 27 N. Y., 300); and in determining that case, it was held that three circumstances must concur in point of time to render a trustee liable:

1. The existence of the debt.
2. The existence of the default in making the report.
3. And the trusteeship.

In the case at bar the amount of the debt is established by the judgment in favor of the plaintiff against the company, and the non-payment thereof is also proven.

This branch of the case, and the sufficiency of the complaint, are fully discussed in the opinion delivered in this case at general term, and reported in 8 *Abb. Pr. N. S.*, 46.

The action was brought to trial at the Kings circuit, June, 1870, and upon the evidence offered and admitted, the court directed a verdict in favor of the plaintiff.

The testimony of the plaintiff, taken by commission in March, 1869, was offered and read in evidence; that testimony refers to the judgment, and states the facts out of which the indebtedness arose. The defendants' counsel objected to the admission of this evidence upon various grounds, the chief of which appears to have been that these facts were not stated in the complaint.

The defendants had put in a very full answer, setting up several defenses, and the plaintiff had put in a

Miller *v.* White.

reply. Certain issues were thus formed, and testimony pertinent to these issues was certainly admissible. In other words, if the plaintiff, in addition to the matters set forth in the complaint, was allowed to testify upon commission as to matters not embraced in the complaint, but distinctly raised and presented as a defense by the answer, it cannot be held as error to admit the testimony.

The defendants had answered that their trusteeship ceased at a certain time. It was competent for the plaintiff to show that this claim had accrued prior to that time ; and if it be said that the complaint did not allege the fact, it is sufficient to say that the answer first raised that question ; and if it were a material allegation in the complaint and omitted therein, and not taken advantage of by demurrer, the court has ample powers to permit an amendment before or after judgment. As to the practice on this point, see *Lounsbury v. Purdy* (18 *N. Y.*, 515).

The defendants objected to the introduction of the judgment roll, upon the ground that the same was imperfect, having no summons or minutes of trial annexed. The complaint and answer were a part of the judgment roll, and the decision of the judge before whom the action was tried was included therein. The office of a summons is to bring parties into court. The judgment was not obtained by default for want of an answer. A very full answer was put in ; the answer shows that the defendants had been brought into court. They did not appear, however, at the trial, and an inquest was taken against them, and if the clerk of the court did not annex the summons to the judgment roll, as is his duty, the omission will not deprive a prevailing party of his rights (*Renouil v. Harris*, 2 *Sandf.*, 641 ; *Earle v. Barnard*, 22 *How. Pr.*, 437 ; *Hoffnung v. Grove*, 18 *Abb. Pr.*, 14 ; *S. C.*, 42 *Barb.*, 548).

With respect to the minutes of trial, the judgment

Miller *v.* White.

roll shows a trial before the judge (a jury being waived); his findings in favor of the plaintiff; and directions for judgment. The judgment roll, with the exception of the summons, appears to meet the requirements of section 281 of the Code; and as to its sufficiency, or the effect of any irregularity, the judgment roll is not a nullity (2 *Sandf.*, 641; 4 *Den.*, 243; 1 *Duer*, 686).

With respect to the actual filing of a report, the plaintiff offered testimony establishing a thorough search in the proper county clerk's office for the report required to be filed, and an examination of records and indices in the usual and accustomed places for keeping such papers, and for the making of entries of the filing thereof, and that no such papers or the filing thereof appeared or could be ascertained upon such search, which was twice made.

The defendants offered testimony going to show the preparation of a report, and that the same was handed to one of the officers of the company for filing, and one witness thinks he saw it published in a newspaper. This evidence does not meet the fact which the plaintiff's testimony tended to establish, and it is not sufficient proof to go to a jury as to whether the report was, in fact, filed and published, as required by the statute; and no other proof was offered by the defendants to establish that fact.

It becomes important to determine the period of time when the defendants ceased to be trustees. There is no dispute that they were and continued to be trustees during the twenty days subsequent to January 1, 1865, within which time the report was required to be made, published and filed, or in default thereof their liability attached.

The action brought by the plaintiff against the company was commenced January, 1865, and the judgment recovered thereon June 27, 1866.

In the present action the defendants set up in their

Miller *v.* White.

answer that the company was duly dissolved and ceased to exist on April 21, 1865; the defendant J. P. White avers that he resigned the office of trustee on February 16, 1865; the defendant M. M. White avers that he never acted as trustee after the same date, that he never accepted any appointment or election as trustee after that time, and that he was never so elected "after said February 16, or at any time after March 10, 1865."

The defendant Lazell avers that the company was dissolved April 21, 1865, and that it performed no corporate act after that period, and he denies that he has been a trustee since that date.

As to the defendant Moores M. White it appears by his examination, that he became a trustee at the organization of the company (in 1863), and continued such trustee as long as the company existed. There is no proof of the dissolution of the company, and on the trial it was stated by defendant's counsel that they did not claim the company was dissolved legally, but merely that it ceased to do business.

M. M. White also testified that he supposed the company's existence terminated in the early part of 1865; he also stated that he was elected a trustee for one year from March, 1864, and that he never resigned. If he did not resign, and if no successor was elected to take his place, he continued to fill the office, or, in other words, to hold over; and it was claimed on his behalf, that he ceased to be a trustee before the judgment was recovered against the company, and, therefore, that it could not be used as evidence against him. The same claim is now made on behalf of the defendant John P. White, but this objection was not made as to either of them at the trial when the judgment roll was introduced, and is not properly before the general term; but having been discussed there, a brief review of it will be proper here.

Miller *v.* White.

In *Moss v. Oakley* (2 *Hill*, 265), the defendant was a stockholder when the debt was contracted ; the declaration did not aver that he so continued until the judgment was recovered. On demurrer the declaration was sustained, and the judgment held binding on the stockholder.

In *Moss v. McCullough* (last reported, 7 *Barb.*, 279, 293), the litigation was of several years' duration, and was twice before the court of last resort ; and although the defendant was not a stockholder when the judgment was recovered against the company, it was held to bind him—and Judge WILLARD says at page 293, it matters not that the defendant had ceased to be a stockholder, the judgment was proper evidence, &c.

The settled principle is that a creditor, having once established his claim against a corporation by judgment, shall not be compelled, in seeking a remedy against stockholders or trustees, to re-establish the fact of original indebtedness.

The judgment he obtains against a corporation may be impeached for fraud or collusion, but not otherwise ; and both stockholder and trustee may relinquish their positions and escape liability for future obligations, but they cannot thereby change the course of proceedings, or the rules of evidence, or their liability as to obligations theretofore incurred by the corporation.

A trustee is not only a stockholder, but he is an officer of the company, with peculiar means of controlling its affairs, and the reasons why he should be bound by the rules of evidence applicable to stockholders, do not require to be expressed here ; they will be found very fully stated by Justice WOODRUFF in *Squires v. Brown* (22 *How. Pr.*, 35).

It is not disputed that the omission (if any) to make the report, and the trusteeship of the defendants, were concurrent in point of time. It remains to be seen whether the plaintiff's claim, for which he recovered

Miller *v.* White.

judgment against the corporation, accrued during the trusteeship of the defendants. It will appear from the foregoing statements that the defendant M. M. White at no time ceased to be a trustee, save by inaction; the question is not raised as to the defendant Lazell.

The defendant, J. P. White, in testifying, states that he resigned as trustee on February 16, 1865, and both he and the defendant, M. M. White, insist that the claim accrued after that period.

The evidence of the plaintiff shows that the debt accrued prior to February 14, 1865; his services commenced September 1, 1862. A contract in writing was made August 1, 1863, and he says that he continued in the employ of the company after February 14, 1865; that he received money from them after that date, and gave them credit for two thousand seven hundred and seventy-two dollars and fifty cents, an amount large enough to balance the services and more.

On the part of the defendants, various questions were put to the witnesses examined on their part, as to whether the company owed the plaintiff anything; but the court properly overruled these questions, upon the ground that the answers would impeach the judgment, and that the judgment could not be so impeached. The questions were put in a variety of forms, but all to the same effect, and the court said, "You may show what, if any, of these services were rendered subsequent to February 16, 1865."

Two exhibits were then offered in evidence by defendants, the one being an account dated April 15, 1865, rendered to the company by the defendant; and the other a letter written by the plaintiff, dated May 22, 1865; these were received in evidence. This letter is a reply to, and contains extracts from, letters received by the plaintiff from the company's officers, and speaks of a shipment of five hundred ponchos, on March 30, to make up a deficiency in former shipments of pon-

Miller *v.* White.

chos. The letter also speaks of commissions due him when the last voucher from the government was obtained on April 16, 1865; but none of the evidence meets the case on the part of the plaintiff, or tends to establish, as a fact, that the liability or debt of the company accrued after the defendant John P. White ceased to be a trustee.

None of the books of the company were produced upon the trial, the defendants testifying that they could not find them, that the books had passed into other hands, and that the company had sold out to a new company in the spring of 1865.

At the conclusion of the trial the defendants claimed to go to the jury on the question of fact as to the filing of the report. The court refused this, and stated that there was no question for the jury in the case.

An examination of the whole case shows that there was no impeachment of the judgment as to the amount due, nor any proper evidence offered to that end. Nor did the evidence, as a whole, raise any question of fact, which could have been properly decided in favor of the defendants, either as to the making of a report, or as to the "time" when the plaintiff's claim accrued.

The defendant's fifth request to charge, went to all the defendants and was clearly improper. No attempt was made to separate one of the defendants from the other in that request. The sixth request assumes a fact which was not established, and so with the subsequent requests, and the attention of the court was not called to any questions arising on the evidence as to the amount of the indebtedness at the time of the alleged resignation of the defendant John P. White.

On the argument at general term the defendants' counsel claimed that no debt existed in favor of the plaintiff upon the written contract with the company, while John P. White was trustee. The concluding clause of the contract says, "that when all bills certi-

Miller *v.* White.

fied shall have been received by them, they will pay a portion of them equal to ten per cent., &c."

The claim of the plaintiff appears to have been for services commencing in September, 1862, and for other services commencing upon and under the contract which is dated August 1, 1863. So that the services covered a considerable period of time. There was no claim that the company had not the benefit of the contract, and there were large sales of goods, by the plaintiff, for the account of the company, to the government, while the defendants were trustees. That provision of the contract simply points out how and when the plaintiff should be paid—it does nothing else. If the defendants were trustees when the goods were sold, and the services rendered, then they were trustees when the plaintiff's claim accrued; but no question presenting the case in this manner was mooted at the trial, and in that respect there is no ruling to be examined or corrected. As previously stated, the plaintiff in his testimony shows that he continued in the company's service after February 15, 1865, and received money thereafter, and had fully credited the company for all services after that period, and no books or accounts of the company were produced, and no competent proof offered to refute this.

The rulings of the court appear to have been proper on the whole case as presented, particularly as to the defendants M. M. White and Lazell, nor was there any error as to the defendant John P. White, and the judgment should affirmed with costs.

Judgment accordingly.

Woodward *v.* Stearns.

WOODWARD *against* STEARNS.

New York Common Pleas; Special Term, March, 1871.

ATTACHMENT.—JURISDICTION OF COMMON PLEAS.—
OMISSION TO FILE PAPERS.—TIME OF COMMENCING
ACTION.—UNLICENSED BROKER.

An attachment may be issued, as a provisional remedy under the Code of Procedure, in an action in the New York common pleas against non-residents, before personal service of the summons, provided the summons has been previously issued, and is, before levying the attachment, personally served within the county of New York, on the defendant, or on one of several jointly indebted.

An attachment will not be vacated, as matter of course, for failure to file within ten days, the papers on which it was issued.*

An action by a broker to recover commissions earned upon negotiating a contract, the commissions being computable upon the amount to become due to his employer under the contract, may be commenced before the contract has been fully performed, the plaintiff, however, taking the risk of being able to prove the amount of his compensation if the trial takes place before such performance.

The fact that the broker had no license under the internal revenue laws, does not affect his right to recover upon an express contract for fixed compensation.

Motion to vacate attachment.

On August 12, 1870, a summons for money demand on contract was issued in this action, and an affidavit was made by John G. Woodward, the plaintiff, stating that the defendants, Stearns and Clark, were copartners in business, and both of them were non-residents of this State; that they were indebted to the plaintiff "in the sum of forty thousand dollars for commissions which said defendants agreed to pay to deponent for his services in and about the obtaining of a contract by

* See also Rules of 1871, No. 7, and No. 5.

Woodward *v.* Stearns.

the defendants to construct the New York, Housatonic and Northern Railroad, said commissions being two and one-half per cent. upon the amount payable to the defendant under said contract, which amount, as deponent is informed and believes, is sixteen hundred thousand dollars." The affidavit further stated that said commissions were fully due, that the defendants had property within the State, namely the said contract with said railroad company, and money due and to become due to them thereon, and other property, and that a summons had been issued in the action.

On September 26, 1870, the summons was served on the defendant Clark, alone.

On September 27, 1870, the affidavit and summons were presented to Chief Justice DALY, who thereupon issued a warrant of attachment against the partnership property of the defendants Stearns and Clark, which was served upon the railroad company.

The affidavit was not filed until October 10, 1870.

The defendant Clark alone appeared in the action, and issue was joined.

On December 16, 1870, an order to show cause why the attachment should not be vacated was granted, and the following grounds of the motion were specified : "because of the matters appearing in said affidavits, summons, complaint, warrant, and other proceedings, and such further affidavits as may be served under this order ; and further because the summons in this case has not been served on the defendant Stearns, nor any publication thereof has been commenced within the thirty days next following the issue of the summons ; also because it appears from the complaint and from the plaintiff's affidavit of August 12, 1870, upon which the alleged warrant of attachment was obtained, that the plaintiff had no cause of action against, and that nothing was due to him from the defendants, when the suit was commenced or the warrant was issued ; and

Woodward *v.* Stearns.

further because, if the defendants were in any wise liable to the plaintiff, their liability is not such or the same as is set forth in said affidavit and complaint; also because said warrant has not been executed against the property of the defendants or of either of them, but only against the property of another party, namely, Bartholomew McDonough, or Clark and McDonough; and because said affidavit for the attachment was not filed in the office of the clerk of the county of New York within ten days from the issuance of the warrant."

Voluminous affidavits were served with the order to show cause, to the effect that the defendant Stearns had sold his interest in the contract to one McDonough, and denying the plaintiff's right to recover, upon the merits.

Peck & Wright, for the motion to vacate the attachment.

Strong & Shepard, opposed.

JOSEPH H. DALY, J.—This court acquires jurisdiction of an action upon contract brought against copartners who are non-residents of this State, if the summons be personally served in the city and county of New York upon one of the copartners (*Code of Pro.*, § 33, subd. 2).

An attachment in such an action may be issued under section 227 of the Code, to attach the copartnership property of the copartners. This has been so held in the superior court of the city of New York (1 *Duer*, 662); that court having under the Code the same jurisdiction as the court of common pleas (§ 33).

It has also been held in the superior court that an attachment may be issued in that court under section 227 of the Code, in an action against non-residents of the State before the personal service of summons; that

Woodward *v.* Stearns.

a levy before personal service would be invalid, but that after such service the attachment might be levied (*Gould v. Bryan*, 3 *Duer*, 626; *Zerega v. Benoist*, 7 *Robt.*, 199). The reasoning in both of these cases is fully applicable to like cases in this court, and is entirely satisfactory to me. It has been the rule followed in this court.

In this case an attachment was granted by Chief Justice DALY upon an affidavit stating, among other requisite matters, that the action had been commenced by the "issuing" of the summons. This, under section 227, was enough to show that the action had been commenced in order to authorize the granting of a warrant under that section. It is not claimed that the summons was not, in fact, issued at that time; it is, however, asserted by the plaintiff on this motion, that the summons was personally served on one of the defendants (jointly indebted with his co-defendant) before the attachment was levied, and the defendant does not assert the contrary. This case seems, therefore, to be brought entirely within the rule in *Gould v. Bryan*, above cited. The attachment cannot, therefore, be set aside as irregular or invalid. My view is that in this court, an attachment under section 227 of the Code may be granted whenever it shall appear (with the other necessary facts) that the action has commenced by the issuing of the summons; and that, if the same attachment be levied after personal service of the summons in this county the levy is valid.

As regards the points made on this motion involving the merits of the plaintiff's claim it is enough to say:

1. That the practice of the court is to decline to try the action upon affidavits, on such a motion, where the affidavit on which the attachment was originally granted "specifies the amount of the claim and the grounds thereof," and shows that a cause of action exists (sec-

Bolles *v.* Duff.

tion 229 of Code); and the affidavit in this case seems a compliance with that section.

2. That it seems to me the action is not prematurely brought, since the plaintiff, if his statement be true, was entitled to his commission when the contract between the railroad company and the defendants was executed (which was before the commencement of this action), and the plaintiff, chooses to take the risk of being able to fix the amount of his compensation before the contract is completed, if the trial of the action takes place before that period.

The failure to file the affidavit on which the attachment issued within ten days (*Code*, § 229), is no ground for vacating the attachment (*Brash v. Wielarsky*, 36 *How. Pr.*, 253). The validity of the warrant or the proceedings on it are nowhere in the law made to depend on a compliance with the direction as to filing the affidavits.

So far as the point that the plaintiff had no Federal license to act as broker is concerned, that fact does not affect his right to recover upon an express contract for fixed compensation.

Motion to vacate attachment denied.

BOLLES *against* DUFF.

Court of Appeals; December, 1870.

**STRICT FORECLOSURE.—REDEMPTION.—BAR.—
PARTIES.**

In an ordinary action for foreclosure and sale of mortgaged premises, the usual decree for that purpose is final, so far as to be appealable to the court of appeals, without awaiting the order confirming the report of the sale.

In an action brought to have an assignment of a lease, absolute on its face, declared a mortgage, a judgment so declaring it, but ordering

Bolles *v.* Duff.

the complaint dismissed within a certain time, if redemption be not made, is not a foreclosure of the mortgage until the final order so dismissing the complaint is obtained; and the plaintiff may apply to the court to extend the time limited for redeeming.

Such judgment is not a bar to an action brought against the assignee by a receiver appointed at the instance of judgment creditors of the assignor, to secure the benefit of the judgment, even though the premises are not redeemed within the time limited.

Where an assignee for the benefit of creditors collusively refuses to enforce rights vested in him as trustee for their benefit, a receiver of the debtor's property, appointed at the instance of creditors, may maintain an action in his stead, and the court may direct the property so reached to be distributed according to the provisions of the assignment.

Appeal from an order.

This action was brought by Jesse N. Bolles, as receiver, against John A. Duff, Wm. H. Roberts and John M. Trimble.

On July 26, 1856, Trimble assigned to Whitney and Earl, of New York city, as security for a loan to him, a lease of certain lots, upon which he afterwards erected what was known as Laura Keene's theater, costing about fifty thousand dollars. Upon its face the assignment was absolute. On January 7, 1857, Trimble assigned said lease and all his other property to Roberts, in trust to pay debts, and if there were any surplus, to return it to Trimble. In the spring of 1857, Roberts having first tendered to Whitney and Earl some thirty-six thousand dollars in full for the money advanced on the security of said lease, and demanded an assignment thereof to him, and a surrender of the premises leased, commenced an action against them to have said assignment of the lease declared a mere security or mortgage for the money advanced thereon, and to redeem the premises therefrom. Whitney and Earl denied that the assignment was intended as a security, but insisted it was, and was intended to be, absolute; but asked for no foreclosure or other affirmative relief.

Bolles *v.* Duff.

Such proceedings were had in that suit, that upon the report of a referee as to the amount advanced and unpaid, the supreme court, on December 13, 1862, adjudged that the sum of twenty-six thousand two hundred and forty dollars and ninety-seven cents was due to Whitney and Earl from Trimble, and that said assignment of the lease was taken and held as a security therefor; that upon payment thereof within two months from that date they should reassign the lease to Roberts; "but, in default of the plaintiff paying unto said defendants the aforesaid sum of twenty-six thousand two hundred and forty dollars and ninety-seven cents, with interest from December 13, 1862, within the time aforesaid, it is ordered that the said plaintiff's complaint be and do from thenceforth stand dismissed out of this court."

On January 22, 1863, the defendant, Duff, procured an assignment from Whitney and Earl, with the written consent of Roberts, of all their rights under said lease and under said decree. Roberts did not pay the money specified in the decree.

In the early part of July, 1863, the plaintiff in this suit, who had been appointed receiver in supplementary proceedings taken by certain creditors of Trimble, commenced this suit to get the benefit of the decree made in the suit of Roberts against Whitney and Earl.

This suit was commenced in behalf of the plaintiff and all other creditors of Trimble, and the complaint alleged among other things, in substance, that Roberts neglected to give the creditors of Trimble notice to aid him in complying with the decree, and willfully and by collusion with Duff neglected and refused to pay it himself.

The answer of Roberts did not deny the collusion, or the willful neglect and refusal to redeem. The answer of Duff denied all collusion, and claimed the property as his own.

Bolles *v.* Duff.

The cause was tried before Justice POTTER, who found the facts as to the lease, the advance by way of loan by Whitney and Earl upon the assignment thereof to them, the general assignment by Trimble to Roberts for the benefit of creditors, the action by Roberts against Whitney and Earl, the decree therein, and the assignment of that decree to Duff with the assent of Roberts as before stated, and with full knowledge by Duff of all the antecedent facts as to the nature of the assignment of the lease to Whitney and Earl, and its object. That Roberts never offered the property at public or private sale, and did not notify the creditors of Trimble of the decree or of its requirements. That he was insolvent, and though prior to January 22, 1863, (the date of the assignment to Duff) he applied to several parties to take up said decree, yet it did not appear on what terms or for whose benefit. That after that date, Roberts made no attempt to sell the property, or to obtain its rents or in any way to make it available to the creditors of Trimble, but tacitly consented that Duff might keep the same as owner, and that Duff purchased said lease, &c., through a Mr. Kimball as agent, who was also the attorney of Roberts and Trimble in that transaction. The court decreed that the property in the hands of Duff was liable for the claims of the creditors of Trimble after satisfying the proper advances of Duff, and directed a reference to ascertain the amount of such advances.

The provision of the decree upon the latter point was as follows:

"The transfer of the defendant Roberts to Duff, whether fraudulently intended by Roberts or not, was an abuse of his trust, and conferred no rights on Duff to the prejudice of Trimble's creditors, and if Duff does not in equity assume the same trust as Roberts was clothed with, then Roberts' transfer is to be deemed and judged, in equity, as fraudulent against those creditors, and void to divest them of their rights, and

Bolles *v.* Duff.

should estop Duff from claiming that his purchase was absolute, so as to cut off those creditors."

The directions for a reference provided that "Duff must be allowed the moneys paid by him for the decree and claim, with interest thereon, and all taxes, assessments, insurance, necessary and reasonable repairs, with interest, and the cost of and interest on all such improvements as have added permanent value to the property and have increased the rents and income thereof, and an allowance of one thousand dollars for his energy and efficient management of the property." Also that Duff was to be charged with "all the moneys received for the rents, income, issues and profits of the premises transferred to him by the sale" from Roberts to Whitney & Earle, and interest on moneys so received by him, &c. And the decree finally provided that after liquidation of the account so to be taken,—"out of any moneys that remain then that there be paid to the creditors of said Trimble the amount of their claims *pro rata*, according to the terms of said assignment" from Trimble to Roberts,—any surplus to be paid to Trimble.

Upon an appeal to the general term this judgment was reversed by a majority of the court in the first district, and a new trial ordered, upon the ground that the judgment in the suit of Roberts against Whitney was an absolute bar to this action. INGRAHAM, P. J., dissented.

Other proceedings are reported in 7 *Abb. Pr. N. S.*, 385; S. C., 38 *How. Pr.*, 492; 55 *Barb.*, 580, 313; 56 *Id.*, 567).

Pending the litigation Mr. Duff had been appointed a receiver of the property to abide the event.

B. C. Thayer, for plaintiff, appellant.—I. The action is brought in the names of the proper parties (*Bate v. Graham*, 11 *N. Y.* [1 *Kern.*], 237; *Story Eq. Pl.*, § 184, and authorities there cited; *Connah v.*

Bolles *v.* Duff.

Sedgwick, 1 *Barb.*, 210; Reed *v.* Emery, 8 *Paige*, 417; Long *v.* Majestre, 1 *Johns. Ch.*, 305; Cook *v.* Bolton, 5 *Russ.*, 282; Gedge *v.* Traill, 1 *Russ. & M.*, 281; Brainard *v.* Cooper, 10 *N. Y.* [6 *Seld.*], 356; Hagan *v.* Walker, 14 *How. U. S.*, 29).

II. The action may be sustained, upon the facts found, as an action to enforce the execution of the trust committed to Roberts by the general assignment. It was his duty to redeem, otherwise his action was an injury instead of a benefit to the estate (De Ruyter *v.* St. Peter's Church, 3 *N. Y.* [3 *Comst.*], 238; *Will. Eq. Jur.*, 614; Matter of Mechanics' Bank, 2 *Barb.*, 446; Hardmann *v.* Bowen, 39 *N. Y.*, 196, 200; Litchfield *v.* White, 3 *Sandf.*, 545; Pingree *v.* Comstock, 18 *Pick.*, 46). A receiver or other officer of the court can carry the decree into effect (2 *Barb.*, 446; 39 *N. Y.*, 200, and cases there cited). The plaintiff cannot be prejudiced by the fact that the court did not find all the facts alleged in the complaint, if sufficient were found to authorize the judgment (Conkey *v.* Bond, 36 *N. Y.*, 427, 430).

III. A receiver, appointed in supplementary proceedings, may represent the creditor upon whose judgment he is appointed, in any action to enforce the judgment (Porter *v.* Williams, 9 *N. Y.* [5 *Seld.*], 142; Bostwick *v.* Menck, 40 *N. Y.*, 383, 386.)

IV. Duff not only had actual notice that the assignment of the lease was in the nature of a mortgage, and that Roberts held under an assignment for the benefit of creditors, but being an assignee of the decree itself, his title is subservient to the rights of the parties to the litigation, and, by the fact of the assignment, he became a trustee for Trimble's creditors (2 *Story Eq. Jur.*, § 1257; Smith *v.* Bowen, 35 *N. Y.*, 83; Mechanics' Bank of Alexandria *v.* Seton, 1 *Pet.*, 309; Murray *v.* Ballou, 1 *Johns. Ch.*, 566).

V. Duff, as mortgagee in possession, was trustee in the land for Trimble, and Roberts was trustee under

Bolles *v.* Duff.

the general assignment. It is not possible that by their acts Trimble or his creditors should be deprived of any rights (*Jencks v. Alexander*, 11 *Paige*, 619).

VI. The facts found establish the fraudulent collusion between Duff and Roberts (Case *v.* Phelps, 39 *N. Y.*, 164; *Conkey v. Bond*, 36 *N. Y.*, 427; *Jencks v. Alexander*, *supra*).

VII. The decree in *Roberts v. Whitney* is not a bar to this action (2 *Story Eq. Jur.*, §§ 1036 a, 1045; *Calverley v. Phelp*, 6 *Madd.*, 229; *Goldsmith v. Stonehewer*, 17 *Jur.*, 199; *Osbourn v. Fallows*, 1 *Russ. & M.*, 741; 1 *Fish. on Mortg.*, 2 ed., 317, 574; *Troughton v. Binkes*, 6 *Ves.*, 573; *Bate v. Graham*, *supra*). No affirmative relief was asked by the defendants in that suit, and the court could not decree a foreclosure (*Wright v. Delafield*, 25 *N. Y.*, 266; *Mechanics', &c., Savings Institution v. Roberts*, 1 *Abb. Pr.*, 381). There could be no dismissal until default was ascertained and adjudged by the court, and the decree could not be pleaded in bar (2 *Dan. Ch. Pr.*, 1 Am. ed., 1202, 1205, &c.; *Story Eq. Pl.*, 771; *Mitf. Eq. Pl.*, 237, &c.; *Cooper Eq. Pl.*, 271; *Beame Pl. in Eq.*, 208, 210; *Mitf. Pl.*, 277; *Jouitt v. Gaither*, 6 *Monr.*, 251; *Senhouse v. Earle*, 2 *Ves. Sr.*, 450; *Stevens v. Praed*, 2 *Cox*, 376; *Cater v. Dewar, Dick.*, 654; 2 *Barb. Ch. Pr.*, 200, note b, and cases cited; 1 *Seat. on Decrees*, 467, note; *Stuart v. Worrall*, 1 *Brown Ch.*, Perk. ed., 506, 582; 1 *Smith Ch. Pr.*, 700; *Thompson v. Grant*, 4 *Madd.*, 438; 2 *Fish. on Mortg.*, 2 ed., 1037, § 1881; 902, § 1790; 2 *Van Santv. Eq. Pr.*, 2 ed., 117; *Perine v. Dunn*, 4 *Johns. Ch.*, 140, 143).

It is a mistake to suppose that *Morris v. Morange* (38 *N. Y.*, 172) established a different rule. A decree for the foreclosure of a mortgage and sale of the mortgaged premises was there held final for the purposes of an appeal (see *Beebe v. Russell*, 19 *How. U. S.*, 283; *Farrelly v. Woodfolk*, *Id.*, 288). A decree like the present is interlocutory and not final. To constitute, in cases of

Bolles *v.* Duff.

trust, the former suit a bar, the new suit must be brought by the same party, or his representatives (*Neafie v. Neafie*, 7 *Johns. Ch.*, 1). The subject matter of this action is different from the former; it sets up fraud and violation of trust by Roberts, who was the plaintiff in that action. The question in issue there was simply mortgage or no mortgage, and this is the only decision the parties are estopped from controverting.

VIII. It would be working the greatest injustice to allow Duff to retain property the annual rental of which nearly equals his advance (*Hart v. Ten Eyck*, 2 *Johns. Ch.*, 62, 101; *Tibbs v. Morris*, 44 *Barb.*, 138; *Ryan v. Dox*, 34 *N. Y.*, 307; *Sheldon v. Edwards*, 35 *Id.*, 279; *Boyd v. Dunlap*, 1 *Johns. Ch.*, 478, and cases there cited; *Bigelow v. Ayrault*, 46 *Barb.*, 143).

IX. The right of redemption exists in every person having an interest in, or a lien upon, the mortgaged premises (*Brainard v. Cooper*, *supra*; 13 *N. Y.*, 215). No length of time will bar the right to redeem where there has been fraud (*Marks v. Pell*, 1 *Johns. Ch.*, 594, and cases cited).

X. When Roberts made his tender, the mortgage reverted by operation of law to Roberts as Trimble's assignee (4 *Kent Com.*, 143 (160), 193 (222); 1 *Hill on Mortg.*, 480, 516; *Farmers' Fire Ins. & Loan Co. v. Edwards*, 26 *Wend.*, 541; *Merritt v. Lambert*, 7 *Paige*, 344; *Parks v. Hall*, 2 *Pick.*, 206; *Kortright v. Cady*, 21 *N. Y.*, 343; *Hartley v. Tatham*, 1 *Keyes*, 222; *Hutchings v. Munger*, 41 *N. Y.*, 155; 2 *Pars. on Cont.*, 5 ed., 641, and authorities).

XI. The tender, though not found by the judge, was not controverted, and was proved by uncontradicted evidence. The court will presume that the judge found this fact, and give it the effect of a special finding (*Smith v. Coe*, 29 *N. Y.*, 666; *Sinclair v. Tallmadge*, 35 *Barb.*, 602; *Viele v. Troy & Boston R. R. Co.*, 20 *N. Y.*, 184), and will presume the finding of all other facts necessary to his conclusions, or amend the

Bolles *v.* Duff.

pleadings to conform to the proof (*Valentine v. Conner*, 40 N. Y., 248; 11 *Id.*, 242; 18 *Id.*, 515; 21 *Id.*, 314).

Brown, Hall & Vanderpoel, and *John Graham*, for defendant, respondent. — I. In determining whether the order appealed from should be affirmed, this court is not to restrict itself to the grounds assumed by the general term of the supreme court.

II. This court is not to act upon anything alleged in the plaintiff's complaint (as to which issue was taken by respondent) not proved on the trial. There was no proof of fraud in the assignment from Trimble to Roberts, or in allowing the redemptionary period of two months to expire without taking advantage of it.

III. The assignment being honest (and Judge POTTER directed it to be carried out), Trimble had no interest in the property to communicate to the plaintiff in this action, beyond a right to any surplus remaining after discharging the trusts of the assignment or satisfying creditors' claims. The creditors could not need the surplus to pay their debts, for there could be no surplus until their debts were paid. It was not until then that Trimble had any rights in the matter.

IV. Had the plaintiff brought this action to recover such a surplus for the benefit of Trimble,—and, under the circumstances of the case, he could have brought the action for the benefit of no other person,—it would have been subject to the same defenses as if brought by Trimble himself.

V. The judgment of the special term was wrong, so far as it gave Trimble any surplus after the trusts of the assignment had been fulfilled.

VI. If the action is not maintainable for the benefit of creditors, and only for that of Trimble and his estate, it fails altogether.

VII. This action is barred by the absoluteness of the judgment in the action of Roberts against Whitney

Bolles *v.* Duff.

and Earle. The creditors he represents were embodied in Roberts in that action, and the redemptionary period having expired, in good faith as against Roberts, it expired as against the creditors and Trimble.

VIII. The redemptionary period having expired, the judgment became final, and operated as a bar to another action for the benefit of Roberts, as receiver, or Trimble or his creditors, no matter by whom brought; and, if there was error in it, it could only have been reviewed by appeal. This bar took effect either as a *judgment of dismissal* or as an *absolute foreclosure* of the mortgage. No appeal having been brought from that judgment, it is final.

IX. The argument that the Roberts action should have been summarily dismissed after default in redeeming, is answered by *Morris v. Morange*, 38 N. Y., 172.

X. The plaintiff, if entitled to relief, should be confined to the particular judgments under which he was appointed receiver (*Bostwick v. Menck*, 40 N. Y., 383).

XI. The special term erred in the principle of indemnity to the respondent.

XII. Whatever was conclusive upon Roberts concluded those he represented. Trimble's creditors were parties to the action against Whitney and Earle, in and through Roberts as assignee. The action of the trustee binds those he represents; otherwise the right given by the Code (§ 113), allowing the trustee of an express trust to sue without joining with him the person for whose benefit the action is prosecuted, would be meaningless. If the plaintiff sought the benefit of what Roberts accomplished in that action, he necessarily took it *cum onere*. He could not take the judgment so far as it created a mortgage, and repudiate it as to the two months' period of redemption.

XIII. It is quite unnecessary, to make the judgment a bar, that there should be a finding by the court,

Bolles *v.* Duff.

after the expiration of the time limited by the decree, of the fact of non-payment and a final decree of foreclosure founded on that fact (*Morris v. Morange*, 38 *N. Y.*, 172).

XIV. The preliminary objection, taken below, that the amendment of 1867 to section 268 of the Code, allowing a motion for a new trial upon an interlocutory judgment like the present, did not apply, because the judgment existed before the amendment, is met by the following authorities: *People v. Tibbets*, 4 *Cow.*, 384; *In re Palmer*, 40 *N. Y.*, 561; *Norris v. Crocker*, 13 *How. U. S.*, 429; *Ins. Co. v. Ritchie*, 5 *Wall.*, 541; *Exp. McCardle*, 6 *Id.*, 318; *S. C.*, 7 *Id.*, 506; *Sedgw. on Stat. & Const. L.*, 188-202.

XV. The authorities relied on to sustain this objection do not do it (Citing and distinguishing *People v. Carnal*, 6 *N. Y.* [2 *Seld.*], 463; *Ely v. Holton*, 15 *N. Y.*, 595).

XVI. The judgment of the special term was not warranted by the evidence.

The same counsel also submitted the following additional points, which were those argued in the supreme court.

The *first* branch of the argument referred to the admission of testimony, and to an amendment to the complaint allowed by the judge. These questions were not passed upon by the court.

Second. I. There is no proof that the orders, under which plaintiff claimed to have been appointed, were ever recorded.

II. The recording is as essential as the filing (*Becker v. Torrance*, 31 *N. Y.*, 631; *Hardmann v. Bowen*, 39 *N. Y.*, 196).

III. The receiver, by virtue of his appointment, has the right, for the benefit of creditors, to impeach by action, any fraudulent assignment or transfer of the

Bolles *v.* Duff.

debtor's property (3 *Rev. Stat.*, 5 ed., 226, §§ 1, 2, 3; *Osgood v. Laytin*, 48 *Barb.*, 463; *Porter v. Williams*, 9 *N. Y.* [5 *Seld.*], 142).

IV. The complaint claimed that Trimble's assignment to Roberts was fraudulent. Had that ground been established before, or at the time of the appointment of the present receiver, for every purpose of assigning the property, Trimble would have stood as though no previous assignment had been made.

V. So long as the assignment stands, it is an insuperable barrier to the acquisition of any right by the plaintiff, to bring an action affecting the property devoted by it to creditors, at least, by becoming Trimble's assignee, under the statute relative to supplementary proceedings. Bolles, the receiver, must get rid of it, before he can occupy any other than a subordinate portion in relation to it. If Roberts, as assignee, were recreant to his trust, the remedy was simple; to apply to the court to appoint a new trustee, or else have the creditors assert their rights in their own name. It is not enough that the plaintiff represents meritorious claims; the inquiry is, whether he is the proper party to represent them.

VI. The case resolves itself into this. Four years after Trimble made the assignment for the benefit of creditors, he made another assignment, and, though the first assignment is in force, and the assignee living and not superseded in his trust, the second assignee contends that he has all the rights of the first. This cannot be correct (*Porter v. Williams, supra*; *Ford v. Williams*, 13 *N. Y.*, 577).

VII. Another difficulty with the judgment is this. After the interlocutory decree in *Roberts v. Whitney* was pronounced, and before and after the pronouncing of the final decree, Mr. Trimble claims that he concluded an agreement with Mr. Duff, whereby this, the only item of property existing under his assignment

Bolles *v.* Duff.

for the benefit of creditors, was assigned to Mr. Duff to hold for his benefit, until he found it convenient to settle with his creditors. Justice POTTER, overlooking this testimony, disregarded this arrangement entirely, and administered the assignment to Roberts, as if this agreement had not been made. If Mr. Duff had got control of this property in this way, Mr. Trimble's creditors alone, not Mr. Trimble, could have forced him to respond to them (1 *Story Eq. Jur.*, Redf. ed., § 371; *Waterbury v. Westervelt*, 9 *N. Y.* [5 *Seld.*], 598; *Bostwick v. Menck*, 40 *N. Y.*, 383).

VIII. Justice POTTER should have opened the assignment of the Roberts decree to Mr. Duff, far enough to let in Trimble's creditors only; but he adjudged Trimble the fruits of his self-confessed fraud.

IX. In this light Trimble is to be regarded as the plaintiff in this action, and a complaint presenting such facts, could not have stood the test of a demurrer.

X. If Trimble's assignment to Roberts were fraudulent, how could Mr. Bolles question it when asking the benefit of what Mr. Roberts, as assignee, brought into being?

Third. The conclusions of law.

I. The action of Roberts against Earl & Whitney was expressly brought to redeem the property in question, from the operation of the mortgage. It passed to final judgment, and this is a second action instituted to accomplish the same result, and that too, in favor of parties in privity with the plaintiff in the same action.

II. It has not been proved or found, as a fact, that Trimble's creditors lost the benefit of the Roberts decree, by fraud, or in any way entitling them to relief, or that Mr. Duff was a party to that fraud. The conclusiveness of that decree is taken away on grounds purely technical and unsound. This is overbearing the rule of *res adjudicata*.

III. If the redemptionary period expired without

Bolles *v.* Duff.

redeeming, the decree in question provided by its very terms that the complaint of Roberts, the assignee (who sued strictly in that character), "stand dismissed out of court." The decree was final—the end of the action; such by its very terms, and any further dismissal was uncalled for (*Morris v. Morange*, 38 *N. Y.*, 172). Roberts, in bringing the action to redeem, as assignee, represented Trimble's creditors, and was not bound to make them parties, because he represented them (*Story Eq. Pl.*, 5 ed., §§ 157, 184).

V. Whatever was conclusive upon Roberts as assignee, was conclusive upon them, in the absence of fraud or some peculiar equity.

VI. Standing upon this decree, and asking the benefit of it, the creditors are estopped.

VII. If that decree be regarded as an absolute judgment of dismissal, it barred the cause of action embraced in it beyond the possibility of being revived by any party in any proceeding (*People v. Vilas*, 36 *N. Y.*, 459; 2 *Barb. Ch. Pr.*, 1844, 199, 200; and citing and commenting at length upon *Audubon v. Excelsior Ins. Co.*, 27 *N. Y.*, 216; *Porter v. Purdy*, 29 *N. Y.*, 106).

VIII. If the decree be regarded as a foreclosure of the Earl and Whitney mortgage, in default of redemption (and it had that effect also), no further foreclosure was necessary, no matter how the court expressed itself in the decree; whether by absolutely dismissing his complaint or otherwise. The foreclosure was the effect of the absolute dismissal (*Bangs v. Duckinfield*, 18 *N. Y.*, 592; *Beach v. Cooke*, 28 *Id.*, 508; *Diven v. Lee*, 36 *Id.*, 302; and as to the conclusiveness of a prior judgment see *Sweet v. Tuttle*, 14 *Id.*, 465; *Campbell v. Hall*, 16 *Id.*, 575; *Goodale v. Tuttle*, 29 *Id.*, 459; *Sheldon v. Edwards*, 35 *Id.*, 279; *Plate v. N. Y. Cent. R. R. Co.*, 37 *Id.*, 472; *De Puy v. Strong*, *Id.*, 372; *Snyder v. Trumppour*, 38 *Id.*, 355).

Bolles *v.* Duff.

IX. The court, in *Roberts v. Whitney*, did not exceed its powers in rendering the judgment of foreclosure, and the judgment or decree, not having been appealed from, is a perfect bar to this proceeding.

X. This action was prematurely brought, the complaint being sworn to before any demand was made upon Duff.

XI. The judgment should not, in any event, be permitted to stand, so far as it restricts the indemnity of the defendant Duff to an allowance for the cost of his repairs and improvements. Entering under the supposition that he would become absolute owner in two months, the improvements were made in good faith, as owner, and he should be fully indemnified.

XII. The evidence does not sustain the judgment upon the merits.

XIII. The plaintiff has succeeded in an action he never brought. He set up equities to escape the bar of the decree, but was told by the court that the decree did not stand in his way.

BY THE COURT.—PECKHAM, J. [After stating the facts].—Is the judgment in the suit of Roberts against Whitney, a bar? I incline to think it is not. It is settled in this State that in an ordinary action for foreclosure and sale of the premises, the usual decree for that purpose is final, so far at least as to be appealable to this court, without waiting for the order confirming the report of sale (*Morris v. Morange*, 38 N. Y., 172).

In England a strict foreclosure was the usual remedy. The power to give possession to the purchaser on a foreclosure sale was doubted, but finally exercised by the court of chancery (See *Kershaw v. Thompson*, 4 *Johns. Ch.*, 609, and cases cited). By our statute the court was given power over the whole subject, though the act was in a good degree declaratory (2 *Rev. Stat.*,

Bolles *v.* Duff.

191, 192). Strict foreclosures are now rarely pursued or allowed in this State, except in cases where a foreclosure has once been had and the premises sold, but some judgment creditor or person similarly situated, not having been made a party, has a right to redeem ; —as to him a strict foreclosure is proper.

In general a mere strict foreclosure is a severe remedy. It transfers the absolute title without any sale, no matter what the value of the premises.

The defense in this case claims that the suit of Roberts *v.* Whitney and Earle was simply to redeem, and that the failure to pay the sum decreed to be due within the time allowed, and the complaint being dismissed, operated as a strict foreclosure, and the estate of the mortgagor was thereby forfeited (Perine *v.* Dunn, 4 *Johns. Ch.*, 140, and cases there cited ; Beach *v.* Cooke, 28 *N. Y.*, 535 ; Hansard *v.* Hardy, 18 *Ves.*, 460 ; Wood *v.* Surr, 19 *Beav.*, 551).

But the main purpose of that suit was not merely to redeem. The object was to have the assignment to Whitney and Earle (which was absolute on its face) adjudged to be in fact merely a mortgage. After a long litigation as to that point, the assignment was so held.

The time allowed to a party, to pay the amount deemed to be due on a bill to redeem, is usually six months (Perine *v.* Dunn, *supra* ; *Smith Ch. Pr.*, 2 ed., 275). In the case at bar but two months were allowed, though the case had been defended upon a false and unconscientious claim, and the amount to be paid was large.

The court in making that decree, did not probably have their attention directed to its effect, in case the plaintiffs should be unable to pay within the specified time ; and though it specifies nothing as to its being or operating as a foreclosure, in case the plaintiff fail to pay, yet it is in that respect in the usual form of decrees in such cases (*Smith Ch. Pr.*, 2 ed., 725).

Bolles *v.* Duff.

But if the defendant Duff insists upon this forfeiture, he must show that the decree clearly gives it to him. It seems that there never was in this case any final order obtained (upon proof of the fact that there had been no payment) that the complaint should stand dismissed. The authorities in England are quite uniform that this final order is necessary in a strict foreclosure, and that until that final order is obtained, the mortgage is not foreclosed, and no title passes to the mortgagee (*2 Dan. Pl. & Pr.*, 1205; *Sheriff v. Sparks*, 1 *West.*, 130; *Thompson v. Grant*, 4 *Madd.*, 438; *Faulkner v. Bolton*, 7 *Sim.*, 319; 2 *Fish. on Mortg.*, 1037, § 1881; *Smith Ch. Pr.*, 725; *Hansard v. Hardy*, 18 *Ves.*, 460; *Wood v. Surr.*, 19 *Beav.*, 551). No case is cited in this State to the contrary of this rule; but Chancellor KENT, in *Perine v. Dunn* (*supra*), seems to give it sanction. See his comments there as to the case of *Jones v. Hendrick*.

Without extending this rule beyond the cases to which it is now applied, I think it sound in its application here, to a strict foreclosure, implied from the dismissal of a bill to redeem. Until that order be obtained, the records of the court do not show which party has finally obtained the judgment, or who is the owner of the land. Until that order is obtained, the complainant may apply to have the time to pay the amount decreed to be due, extended.

There are several objections as to the decisions of the court upon admitting or rejecting evidence. But this disposition of the case makes them immaterial.

The action is properly instituted by this receiver under the circumstances of this case, and I think substantial justice is done by the decree. The main complaint of the defendant Duff is that he is not permitted to make a speculation at the expense of the creditors of Trimble, and perhaps of Trimble too, if the proceeds of the property should reach him. If Duff is in any

Matter of Duff.

degree right in his estimate of the value of the property, the question of Trimble's participation in any part of the proceeds of this property can never be a practical one. But no facts are found that exclude him.

The order appealed from is reversed, and the judgment of the special term affirmed with costs.

MATTER OF DUFF.

Court of Appeals, December, 1870.

APPEALABLE ORDER.

To make an order appealable from the special to the general term, it must affect a substantial right. But the fact that it involves an exercise of discretion, does not necessarily prevent such an appeal.

The general term cannot dismiss an appeal, simply because the order appealed from is discretionary.

The general term may, if satisfied that injustice has been done, set aside an order made by it, and again hear the case.

What is a "substantial right,"—discussed. *Per GROVER, J.*

Appeal from an order.

An application was made in the supreme court by John A. Duff, receiver, for permission to lease the Olympic theater, the property placed under his control, at an annual rental of fifteen thousand dollars, to one James E. Hayes, his son-in-law. The peculiar circumstances attending Mr. Duff's possession of the property are detailed in *Bolles v. Duff, Ante.*

The application was opposed by Mr. Bolles, on the ground that the sum proposed was not a fair rent;

Matter of Duff.

various affidavits, from theatrical managers and professionals, were offered on both sides, as to the rental value of the property, those on the applicant's side varying from twelve to fifteen thousand dollars, and those on the side opposed, from twenty to twenty-five thousand. Some offers were made to take the theater, ranging from twenty to twenty-five thousand dollars per annum. After the motion was argued, the counsel for Mr. Bolles handed some further offers to Justice BARNARD, who heard the cause, but he declined to consider them.

The application was granted by Justice BARNARD (see 4 *Abb. Pr. N. S.*, 330), and an appeal was taken to the general term, where the order was reversed (see 54 *Barb.*, 215; S. C., 37 *How. Pr.*, 162), without prejudice to the possession or rights of Hayes under the lease executed to him, pursuant to the order of the special term, during the residue of the first year of his term.

Mr. Bolles appealed from that part of the order, and Mr. Duff from the residue, to the court of appeals, where the appeals were both dismissed, the court holding (LOTT, J., delivering the opinion) that the original order and the order reversing it were both made in the action of *Bolles v. Duff*, still pending and undetermined, since, notwithstanding the notice of appeal was entitled "In the matter of the application of John A. Duff, &c.," the order appealed from was entitled "In the action of *Bolles v. Duff*;" and also that the order was discretionary (See 42 *N. Y.*, 256).

Upon dismissal of the appeal, Duff moved the general term for a re-argument, which was granted, and upon re-argument the appeal was dismissed as involving a question of discretion.

Mr. Bolles appealed to the court of appeals.

B. C. Thayer, for the appellant.—I. The or-
N. S.—X—27

Matter of Duff.

der of the special term was appealable (*Code*, § 349; *Laws* of 1854, p. 592, § 1; *People v. N. Y. Cent. R. R. Co.*, 29 *N. Y.*, 418; *Matter of Livingston*, 34 *Id.*, 555, 580; *Sudlow v. Knox*, 7 *Abb. Pr. N. S.*, 411). Being made in a special proceeding, it was appealable by express language of statute, irrespective of any question as to its affecting a substantial right (*Laws* of 1854, *supra*). The order affects a substantial right, capable of estimation in money (29 *N. Y.*, 418). The ruling in *Bolles v. Duff*, 42 *N. Y.*, 256, that this order was made in this action because it was entitled therein, is contrary to the unanimous ruling in *Sudlow v. Knox*, *supra*. The order in which the present appeal is taken is not entitled in the action. It was made in a special proceeding like *Matter of Livingston*, *supra*. If made in the action at all, it was made in a summary application after judgment, and is, therefore, appealable (*Code*, § 11, subd. 3). In any event it is made appealable by the amendment of 1870, to section 11, subd. 4. Whatever discretion may have been involved was the discretion of the whole court, and not of the judge at special term merely (*People v. N. Y. Cent. R. R. Co.*, *supra*), and the discretion in this case was clearly abused. The judge refused to consider offers that were made. This was not discretion, but error (See 54 *Barb.*, 215; *S. C.*, 37 *How. Pr.*, 162).

II. On this appeal it is proper to review the intermediate order granting a re-argument (*Code*, § 11, subd. 3; *Matter of Livingston*, *supra*). The order was clearly wrong; it was in no just sense an order for a re-argument, but a mode adopted for reversing the decision of a general term composed of other judges.

III. The court will not permit the leasing of the theater to Mr. Hayes at fifteen thousand dollars, when others offered twenty-five thousand dollars and upwards, and to give security for the rent in advance.

IV. The only question of which the court will take

Matter of Duff.

cognizance is how the estate will yield the greatest revenue. Mr. Hayes is entitled to no special privileges because he incurred expenses, since he took the property with full notice that his claim would be contested.

V. The order of special term does not provide for any security.

VI. It being the duty of the court and receiver to make the estate yield the highest revenue possible, all offers, up to the date of the order appealed from, should have been considered.

VII. Duff failed to give notice that the theater would be leased to the highest bidder, and thus cut off the competition of other parties as against his son-in-law. His son-in-law thus acquires the lease for less than others are willing to pay, and this is a breach of trust.

VIII. The affidavits submitted on the part of defendant show fraudulent collusion. They show the valuation of the theater alone, when it appears by counter affidavits, and is not denied, that the theater contained some twenty-eight thousand dollars' worth of scenery and property belonging to the estate.

IX. The justice at special term took upon himself the functions both of master in chancery and chancellor. Having determined that the property should be leased, a referee should have been appointed, to give notice, hear proposals, make the lease, and report to the court for confirmation.

X. Mr. Duff, as receiver, is an officer of the court, appointed for the benefit of all parties establishing rights in the action. He has no powers except those conferred by the court, and must apply for liberty to defend or bring actions. His attempt, in court, through counsel, to sustain his son-in-law, conflicts with his duty as receiver, and stamps the whole transaction with fraud and collusion (*Code*, § 369; 8 *N. Y.*, 138; *Com.*

Matter of Duff.

Dig., Pleader, 2, 3, B., 20; *Lott v. Swezey*, 29 *Barb.*, 87; 9 *How. Pr.*, 80; 3 *Abb. Pr. N. S.*, 118).

XI. Trustees cannot be permitted to hold a position hostile to the trust. The receiver should be removed and required personally to account for the difference between the actual rent received from his son-in-law, and that he could have received by due care, from the time Hayes took possession, to the final restitution of the premises.

XII. Being a proceeding in equity, the court may not only reverse the order, but make such final order as justice may require (*Matter of Livingston, supra*).

A. J. Vanderpoel, for respondent.

GROVER, J.—The order of the general term from which the present appeal was taken, was one dismissing an appeal from an order of the special term, prescribing the terms upon which a lease of certain real and personal property, in the city of New York, was directed to be executed by the respondents to Mr. Hayes. The respondent was appointed receiver, in an action instituted against him by certain parties claiming the right to redeem the property from him, upon the ground that he was mortgagee in possession, but of which he claimed to be the absolute owner. The appointment of the respondent was made after judgment, in the action, declaring that the appellant was entitled to redeem the property from the respondent. The only ground upon which the appeal was dismissed by the general term was that the order of the special term was one resting in discretion, and, therefore, final in its character, and not appealable to, or reviewable by, the general term. Section 349 of the Code provides that an appeal may be taken to the general term from an order made at a special term by a single judge in the following, among other cases: 3, when it involves

Matter of Duff.

the merits of the action or some part thereof, or affects a substantial right ; 5, when the order is made in a summary application in an action after judgment, and affects a substantial right. It will thus be seen that the question as to the appealability of the order is the same whether it is regarded as having been made in the action, or as made upon a summary application after judgment. In either view, to make it appealable to the general term, it must affect a substantial right. It was supposed by the general term that the definition given by this court of a substantial right in *De Barante v. Deyerman*, 41 N. Y., 355, and in *Foote v. Lathrop*, *Id.*, 358, and in some other cases, was controlling upon that court, and that its meaning, as used in section 349, regulating appeals from the special to the general term was identical with its meaning, as used in section 11, regulating appeals from the general term to this court. If right in this conclusion, the order appealed from is correct and must be affirmed, as it cannot be denied that while it was the absolute right of the parties to have the property in question leased upon the most advantageous terms for those having interests therein, yet the determination of what would be most advantageous when the character of the property is taken into view, involves to some extent the exercise of discretion. In *De Barante v. Deyerman* and *Foote v. Lathrop*, *supra*, it was held that the term substantial right, as used in section 11 of the Code, must be one not only involving some material interest, but one existing absolutely by force of law. In other words, that an absolute right was one to which the party was legally entitled, *ex debito justitiae*, one not at all dependent upon the favor or discretion of the court. It will be seen in thus defining it the court was speaking of it as used in section 11, regulating appeals from the general term to this court, and had in view its use in no other connection. The definition so given, applied

Matter of Duff.

as above stated, was correct, and was, in 1870, so recognized by the legislature in amending the Code. By that amendment, to make an order of this class appealable to this court, it must not only affect a substantial right, but must not involve the exercise of discretion. The latter quality is not requisite to the appealability of orders from the special to the general term of the supreme court. The difference arises from the different purposes for which the respective courts were organized. The court of appeals was designed for the redress of such legal errors as might happen in the course of judicature in other courts, to the end that uniformity in the administration of justice might prevail throughout the State, and that every litigant might have his case tried by the same legal rules. For this purpose no review upon the facts by this court is given, other than so far as the same is necessary to determine legal questions arising thereon,—such as exceptions to the granting or denying nonsuits,—except in one or two instances. The right to review and control the exercise of the discretion of other courts has not been conferred upon this court unless by the clauses of section 11, previous to the amendment of 1870, making orders affecting a substantial right appealable to this court. In the construction of these clauses it was assumed by the court that the legislature did not intend to innovate upon the objects and designs for which the court was constituted, and thereby add to its functions the duty of reviewing the exercise of discretion by the other courts in all cases where the right of parties might be materially affected thereby. Had such been the legislative intention, and had the court undertaken that duty, it is obvious that so much of its time would have been occupied in its discharge as practically to render the court powerless for the discharge of its primary functions. For these reasons it was held that by the term "substantial right," as used in section 11 of the

Matter of Duff.

Code, was to be understood such rights only as the law absolutely conferred, and not such as were dependent upon the exercise of discretion or the favor of the court. This construction harmonized the clauses in which it occurred with the other parts of the Code giving an appeal to this court upon questions of law only.

But none of these reasons apply to appeals from the special to the general terms. The latter were designed not only for the redress of legal errors occurring at the special terms, circuits, and before referees, but those of fact likewise. Hence a review of the facts may be had before the general terms, upon an appeal taken from the judgment and orders of the former courts. They were also designed to redress wrongs arising from an erroneous, arbitrary, or otherwise improper exercise of discretion by the former. Hence the definition of substantial right, as used in section 349 of the Code, in providing for appeals from the special to the general term of the supreme court, in *People v. New York Central R. R. Co.* (29 N. Y., 418).

In this case the special term had allowed the modest sum of twenty thousand dollars as an extra allowance to indemnify a party for the expenses of trying what was claimed to be a difficult and extraordinary case, pursuant to the statute authorizing the court to make such allowances in such cases. Upon appeal from the order to the general term the appeal was dismissed upon the ground that the extra allowance was, by the statute, placed in the discretion of the court, and, therefore, not a substantial right. Upon appeal therefrom to this court, it was rightly held that the right to twenty thousand dollars was a very substantial one within the meaning of the section under consideration, and that the people had the right to the exercise of the discretion of the general as well as of the special term before

Matter of Duff.

paying it; and, thereupon, reversed the order of the general term, and directed that court to proceed and hear the appeal and dispose of the case as in its judgment equity might require. In this case a just definition of a substantial right as used in that section is given by Judge DENIO. This case has never been overruled in any respect, and is undoubted law as to the appealability of orders from the special to the general term.

In the present case it appeared from the affidavits presented at the special term that it was at least possible that the property might have been leased upon terms much more advantageous than those directed by the special term. It was the duty of the general term to entertain and hear the appeal and make such order thereupon as it deemed just.

It is claimed by the counsel for the appellant that inasmuch as the general term had once heard the appeal and reversed the order of the special term, that the general term had no power to grant a rehearing of the case. This position cannot be sustained. It was competent for the general term in its discretion, if satisfied injustice had been done by it, to set aside the order made, and again hear the case, and upon such further hearing make such order as it determined was just and proper.

The order appealed from must be reversed, with costs, and the case remanded to the supreme court to hear and determine the appeal.

My brethren concur in the result, but deeming it unnecessary to determine what is a substantial right as used in section 11 of the Code, do not pass upon that question.

Order reversed with costs.

Fordred *v.* Seamen's Savings Bank.

FORDRED *against* THE SEAMEN'S SAVINGS BANK.

Court of Appeals, May, 1871.

PARTIES.—SAVINGS BANKS.—DRAFTS.

A draft upon a savings bank cannot operate as an assignment of money not deposited till after the draft was drawn; when applicable to such funds, it is a mere authority or direction to the bank.

Such a draft, no interest being proved by the payee, is revocable, and upon the death of the drawer, is revoked.

Hence, the proper party to sue in such a case, is the executor or administrator of the depositor.

This was an action brought by Sarah M. Fordred, to recover the sum of one hundred and forty-five dollars and sixteen cents deposited with the defendant by her son, Drayson Fordred.

Fordred had given the mother a draft upon the bank dated May 30, 1863, for all money and interest standing in his name. The first deposit was not made until July 30, 1863.

Drayson Fordred died June 3, 1864, and the draft was not presented until the latter part of September, 1868. Payment was refused, on the ground that the money belonged to Drayson Fordred's administrators.

Upon the trial, the judge directed a verdict for the plaintiff, to which direction exception was taken, and the court directed the exceptions to be heard in the first instance at the general term, where the verdict was affirmed and a new trial denied. The defendant then appealed to this court.

M. S. Bidwell, for defendant, appellant.—Among other

Fordred *v.* Seamen's Savings Bank.

points, insisted.—I. The order of Drayson Fordred was revocable, and revoked by his death (*Hunt v. Rousmaniere*, 8 *Wheat.*, 174; 2 *Kent Com.*, 646; *Story on Agency*, § 488; 2 *Pars. on Bills*, 210).

II. The presumption is that the ownership never passed (1 *Greenl. on Ev.*, §§ 41, 42; 1 *Cow. & H.*, 295; 2 *Stark. on Ev.*, 36; *Best on Pres.*, 186, 187 [31 *Law Libr., N. S.*]); *Flanders v. Merritt*, 3 *Barb.*, 201; *McMahon v. Harrison*, 6 *N. Y.* [2 *Seld.*], 443).

III. The draft cannot be regarded as an assignment, and Drayson Fordred's right was a chose in action (*Downes v. Phoenix Bank*, 6 *Hill*, 297; *Lund v. Seamen's Bank for Savings*, 37 *Barb.*, 129, 132; *Chapman v. White*, 6 *N. Y.* [2 *Seld.*], 412, 417; *Pott v. Clegg*, 16 *Mees. & W.*, 321); and equity will not give effect to an assignment where there is no consideration (*Prescott v. Hull*, 17 *Johns.*, 284, 292; *Kennedy v. Ware*, 1 *Pa. St.*, 445).

IV. The money being deposited to his credit, he retained control of it (*Rupp v. Blanchard*, 34 *Barb.*, 627).

V. The bank is responsible to Fordred's administrators (*Pond v. Makepeace*, 2 *Metc.*, 114).

S. L. Gardiner, for plaintiff, respondent.

BY THE COURT.—RAPALLO, J.,—The draft upon which the plaintiff founds her claim, could not operate as an assignment of the fund in question, for the reason that the fund did not exist at the time the draft was drawn.

The deposits were not made till long afterward. The drawing of the draft, and its delivery to the plaintiff could not, therefore, vest in her any title, legal or equitable, to the money in question. If construed as applicable to any funds which the drawer might deposit after the date of the draft, it was, as to such funds, a mere direction or authority to the bank.

Fordred v. Seamen's Savings Bank.

There is nothing in the case to show that the plaintiff had any interest in the matter.

A consideration cannot be presumed to have been given by the plaintiff for such a draft. She knew the condition of the bank account. It depended upon the future action of the drawer whether or not there would be any fund to which the draft could apply, and there was no evidence of any obligation on his part to create the fund.

Viewing the draft as a mere direction or power, the plaintiff not having proved any interest, it was revocable, and was revoked by the death of the drawer.

The money belonged to the deceased, and was deposited in his name. It is alleged in the complaint to have been deposited by him. The plaintiff was merely his agent. The bank became indebted to him for the money, and it is accountable therefor to his executor or administrator.

We are constrained to hold that, on the facts proved, the plaintiff was not entitled to recover, and that the judgment must be reversed and a new trial ordered, with costs to abide the event.

Judgment reversed, and new trial ordered, costs to abide event.

Read *v. Lambert.*

READ against LAMBERT.

City Court of Brooklyn; General Term, June, 1871.

BROKER.—FORM OF ACTION AGAINST.—DEMAND AND TENDER BEFORE SUIT.

Bonds purchased and carried by a broker on marginal security, are held by him as *a pledge* for the payment of advances made by him on their purchase; and a sale without authority, and without notice, is *an unlawful conversion*, and renders the broker liable for any subsequent enhancement of their market value; not strictly on a contract, but in a special action on the case to recover damages for a wrong.*

A demand, since it would be nugatory, need not be made before bringing such action; though it would be otherwise if the broker had only pledged the stock in good faith, for the amount due him.

* In *Markham v. Jaudon*, (41 *N. Y.*, 235), it was held that, upon a purchase of stock by a broker on deposit of *margin*, a sale thereof without authority of law, or demand for payment of advances, &c., and upon default, notice of sale, is a *wrongful conversion*.

In *Merriam v. Kellogg* (58 *Barb.*, 445), in a like case of purchase of stock, it was held that the broker could either tender the stock and demand payment, and in default thereof, sue for *purchase money*, treating the property as belonging to the purchasers; or, keeping the property, sue for *damages* upon breach of contract.

In *Lawrence v. Maxwell* (58 *Barb.*, 511), it was held that if, by contract with the purchaser, the broker had a right to use the stock purchased, by hypothecation, no tort would be committed by the omission to restore it upon tender of payment, and the plaintiff's remedy was not for conversion, but *on the contract*.

In *Woodworth v. Morris* (56 *Barb.*, 97), where, after a *sale* of stock, it was agreed that it should be returned, if the purchase money was repaid within a certain time, the transaction was held to be a conditional sale or a mortgage, and in neither case could trover be maintained for a failure to return the property, upon a tender of repayment after the day limited.

In *Fullerton v. Dalton* (58 *Barb.*, 236), where one in possession of property had only a partial or conditional title thereto, as purchaser under a void contract of sale, which each party refused to perform, except according to his own understanding of its terms, it was held

Read *v.* Lambert.

After a tender of the bonds and demand of payment, and notice of sale, given after default, the net proceeds would have been the measure of the broker's liability, upon a claim *for money received* to the plaintiff's use.

It may be conceded that if a complaint contains only what was necessary in a declaration in trover, a right to immediate possession, or a demand and tender, would be necessary; but in a complaint alleging facts which would sustain a special action on the case, the mere use of the term conversion does not render a demand, &c., necessary.

To determine the rights and liabilities of the parties, pleadings are to be liberally construed.

A complaint is not to be dismissed at the trial if facts alleged in it, although inartificially or with unnecessary matter, constitute a cause of action, and are substantiated by proof.

Appeal from a judgment dismissing a complaint.

The action was brought by George W. Read as executor, against Edward Lambert.

The allegations of the complaint were, substantially, that Henry W. Read employed the defendant Edward Lambert, on commission, as his broker and agent, in buying and selling securities, and collecting the interest thereon. That between November 1, 1864, and November 1, 1865, the defendant bought on the account of said Read, United States bonds, with interest coupons attached, amounting at par to one hundred and fifty thousand dollars, which defendant has retained as

that, after demand of the property, the purchaser was wrongfully in possession, and his use was a *conversion*.

In *McNeil v. Tenth National Bank* (55 *Barb.*, 59), in a case of deposit of margin, it was held that the relation of pledgor and pledgee was created, and the latter had no legal right, secretly and without the knowledge of, or notice to, the pledgor, to sell the stock pledged.

The rule of damages applicable in such cases of conversion, as laid down in *Scott v. Rogers* (31 *N. Y.*, 676), and followed in *Markham v. Jaudon* (41 *N. Y.*, 235), is to allow the plaintiff the highest market price of the property prevailing between the time of the conversion, and a reasonable time thereafter within which to commence the action. In the last mentioned case the rule was stated as including the fluctuations of the market down to the time of trial.

Read *v.* Lambert.

security, as alleged, for payment of any sums which might be or become due to him, upon the above transactions; and that he has collected and received the interest thereon. That said Henry W. Read died in January, 1866, and the plaintiff, being appointed as sole executor, duly qualified as such. That on August 15, 1867, upon a statement of account between defendant and the plaintiff, as executor, &c., a balance of one hundred and thirty-three thousand eight hundred and eighty-seven dollars and thirty-nine cents being found due the defendant, the said bonds and interest coupons not matured were converted by defendant to his own use. That since the conversion, the said bonds and coupons have been of the value of one hundred and eighty-two thousand five hundred dollars, which, after deducting the amount due the defendant upon the balance of indebtedness aforesaid, leaves thirty-three thousand five hundred dollars damages sustained by the plaintiff, executor, &c., by the aforesaid conversion, for which the plaintiff demands judgment. The summons was for relief.

The answer denied the allegations of the complaint.

On the trial, after proof of the facts stated in the complaint—and also the advance of money to the defendant on account of the purchase of the bonds, the defendant moved for a dismissal of the complaint for the want of proof of a demand and tender sufficient to give the plaintiff a right to the possession of the bonds, and the motion was granted; and afterwards an application for a new trial, on the minutes, was denied.

Judgment having been entered for the defendant, the plaintiff appealed to the general term.

Joshua M. Van Cott, for plaintiff, appellant.

Daniel T. Waldren, for defendant, respondent.

BY THE COURT.—NEILSON, J.—The defendant, as the

Read *v. Lambert.*

broker of Henry W. Read, the testator, purchased for him certain bonds of the United States, with coupons attached. The testator contributed some money towards the purchase, but the larger portion of the price was advanced by the defendant. He held the bonds as security for what might be due to him on the account, and in the due course of business collected some of the coupons. The legal title to the bonds and coupons was in the testator.

The amount due to the defendant on those transactions for advances, interest and commissions was never tendered to him, but the bonds were demanded when he was not able to deliver them ; on the first occasion, because they were held by other parties as security in respect to some of the defendant's engagements ; on the second, because he had actually sold them. Such demand, unless accompanied by a known ability and readiness to satisfy defendant's claims, was of little moment. But the testator might have directed a sale of the bonds, in whole or in part, for that purpose.

It does not appear that the plaintiff or his testator was in default in respect to the defendant's claims. Where the broker, upon a partial advance, commonly called marginal security, purchases, holds and carries bonds or stocks, for and at the risk of the customer, no time being fixed for reimbursement, the broker can put the customer in default only by tendering the bonds or stocks, and demanding payment. Without such tender and demand he could not maintain an action to recover his advances and commissions (*Merwin v. Hamilton, 6 Duer, 244*).

Previous to the defendant's sale of the bonds, the account presented a large balance in his favor, the defendant's advances, but not the value of the bonds, being stated. After the sale, and the crediting of the proceeds, the balance against the defendant, including perhaps the increased value of the bonds in the market, is

Read *v.* Lambert.

claimed to have been about thirty-three thousand five hundred dollars. The amount of that balance is not now material, but it is material that the defendant, according to the uncontradicted testimony, and in his correspondence, admitted his liability for an amount which, without success, he had been endeavoring to discharge. The action was brought to recover that amount, as damages.

As the bonds had been held by the defendant as a pledge, the sale without notice was without authority,—a breach of the agreement. In the complaint it is properly called *an unlawful conversion* of the bonds to the defendant's own use.

If the defendant had tendered the bonds and demanded payment, and, upon default, had given notice of sale, the net proceeds, remaining over and above his claims, would have been the measure of his liability. In that case there would have been no claim for damages properly so called. The claim would have been for so much money received to the plaintiff's use. But having sold the bonds without authority, he became liable for the subsequently enhanced market value of the bonds and coupons, less the amount of his own claims, as, by his wrongful act, the plaintiff had suffered damages to that extent. Those damages, shifting in amount according to the fluctuations of the market, could not be determined until the day of settlement or of trial (if the subject of litigation) in an action brought within a reasonable time after the wrongful sale. In that case the claim to indemnity does not rest strictly in contract, but arises rather as the natural result of the wrong committed by the defendant; it is for *damages*, using that term in its strictest sense.

In the absence of a tender to the defendant of the amount due to him while he was holding the bonds, neither the testator nor the plaintiff was entitled to the

Read *v.* Lambert.

possession of them. The right of possession resided in the defendant. After the sale the question as to the possession of the bonds, or the right of possession, as between these parties, ceased to have any practical importance. The bonds were beyond the control of the defendant, beyond the reach or reclamation of the plaintiff. A tender to and demand of the defendant while he held the bonds would have been a business-like proceeding; such tender and demand, after he had deprived himself of the means of responding, would have seemed fruitless and nugatory. As a general rule such nugatory acts need not be performed (5 *Duer*, 62; 1 *Bosw.*, 558; 3 *Barb.*, 612; 50 *Id.*, 79; 40 *N. Y.*, 584).

But prior to our present system of legal procedure, when actions of trover and replevin might have been brought, and when the plaintiff's election to pursue such remedies depended upon his right to the possession of the property converted, or sought to be reclaimed, such tender would have performed an important office; it would have ministered to the right of possession. Not that the law, even then, was chargeable with undue solicitude as to the observance of mere forms, or the performance of nugatory acts as a prerequisite to an action, but that one by whom money must have been paid before he could become entitled to recover the property or its value, should not elect to adopt those forms of action without first discharging his own obligation, and giving the other party an opportunity of receiving payment and making restoration.

In cases of bailment this was the more proper, as, after much contention, it was seen that repledging the property, or parting with its possession by the bailee, in good faith, for an amount not greater than that for which it had been pledged to him, reasonably tended

Read *v.* Lambert.

to promote the convenience of business, and should not work an utter dissolution of the original contract.

But a due regard to the rights of the parties, and to the principle invoked in such cases, involved a distinction between the passing over of the property by the pledgee to another for an amount not greater than that for which it had been pledged in the first instance, and the case of such transfer of the property for a larger amount, or of its sale to a stranger (*7 East, 7, 8*).

In the one case, the rights of the original pledgor are respected ; in the other, they are disregarded, may be utterly defeated. It would be reasonable to require a tender by the pledgor in the former instance ; equally reasonable to dispense with it in the latter.

But, as a remedy for an injury to the property pledged, or for the destruction or conversion of it, the old special action on the case was to be preferred. As the question of an immediate right of possession was not in the way, no merely formal tender was necessary, and the plaintiff could recover damages, as an indemnity. Where the defendant, chargeable with the conversion of the property, had made advances on it to the plaintiff, or received it of him as mere security, his claim could be allowed, and the plaintiff recover the excess of the value.

Although these forms of action, as such, have been abolished with us, it is said that the rules and principles peculiar to them, as essential elements, remain in full force. But, laying out of view the action under the Code of Procedure to recover the possession of personal property,—an action analogous to that of replevin,—it will be found that that proposition has no extended value or significance. Although it be true that those principles remain in full force, yet the most that could be said is, that if, under our present system of pleading, the complaint contain only the matters which under our former system were peculiar to a

Read *v.* Lambert.

declaration in an action of trover, the issue would now be tried as it would have been before the Code; and the right of possession in the plaintiff, or a tender and demand by him, would be as necessary as before. The analogy would hold in respect to other actions.

But if it were necessary to give to this case the name of some old form of action, with a view to the present application of rules and principles which would have been applied on a like state of facts before the Code, we should regard this as a special action on the case, brought to recover damages for a wrong. It is not the less an action on the case because a *conversion* of the property is charged, although that term was most commonly found in a pleading in trover. In either form of action a tortious act would have been charged by the use of that or some equivalent term.

None of the cases cited by the learned counsel for the respondent conflict with the general views here expressed. The cases most relied on—Donald *v.* Suckling (1 *L. R.*, *Q. B.*, 585), which was in *detinue*, and Halliday *v.* Holgate (3 *L. R.*, *Exch.*, 299), in *trover*,—have, in their results, no direct application.

But in the former case Mr. Justice SHEE shows, quite clearly, that repledging or selling the securities by the pledgee for a larger sum than that for which they had been originally pledged, was a conversion, and entitled the owner to reclaim the property, divested of the lien. And in the latter case (p. 300), BLACKBURN, J., assisting counsel *arguendo*, to a correct recollection of what had been said by him in the other case, observed that the statement was “that the plaintiff may be entitled to maintain an action of *tort* against Simpson or the defendant for damages, if any, sustained by him, in consequence of their unauthorized dealing with the debentures.” “The words,” he adds, “were carefully chosen, and, taken in their connection, they exclude the inference that they refer to any ac-

Read *v.* Lambert.

tion which depends upon the right to immediate possession.”

I am not prepared to hold, either upon principle or authority, that, to maintain this action, this plaintiff should have been entitled to the possession of the bonds, or that, as a matter of pleading, a tender should have been alleged.

The question raised in this case seems to have been utterly overlooked in *Markham v. Jaudon* (41 *N. Y.*, 235), in *Brass v. Worth* (40 *Barb.*, 648), and in *Morgan v. Jaudon* (40 *How. Pr.*, 366), analogous cases in which the unlawful conversion of the securities pledged was charged and damages claimed.

In view of the attention which this branch of the law received in those cases, that circumstances is somewhat suggestive.

But the question was raised in *Clark v. Meigs*, an action for an unauthorized sale of stock by the broker who had been carrying it on marginal security. That case was first before the court on demurrer to the complaint; and Mr. Justice ROBERTSON, on the ground that a demand of the stock, and tender of the amount due should have been alleged, sustained the demurrer (12 *Abb. Pr.*, 267). But on appeal that decision was reversed (13 *Abb. Pr.*, 467).

In *Lewis v. Graham* (4 *Abb. Pr.*, 106), the case of a sale, without notice of the stock pledged, held, that a tender of the debt was not necessary. Mr. Justice INGRAHAM refers to *Wilson v. Little* (2 *N. Y.* [2 *Comst.*], 443), citing thus, “Mr. Justice RUGGLES says the sale by the defendants before payment demanded, was, therefore, wrongful. The defendants having voluntarily put it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was, therefore, unnecessary. The same rule is stated in *Cortelyou v. Lansing* (2 *Cai. Cas.*, 200).”

Without further pursuing these inquiries, I am of

Read *v.* Lambert.

opinion that the complaint before us was sufficient. A cause of action was set forth. Under our system of pleading the allegations were sufficient to have let in the proofs necessary to enable the court or the jury, under proper directions, to determine the rights and liabilities of the parties.

Pleadings are to be liberally construed (42 *N. Y.*, 83; 57 *Barb.*, 504; 10 *N. Y.*, 51).

In *Scott v. Pilkington* (15 *Abb. Pr.*, 280, 285), GOULD, J., says: "As to forms of action we have, under the Code, no trouble between actions on the case and those directly on contract. If the facts stated in the complaint give a right of action, the plaintiff can recover on that complaint."

And in *Butterworth v. O'Brien* (24 *How. Pr.*, 438), Mr. Justice INGRAHAM says: "Under the late decisions of the court of appeals we are not to pay any attention to forms, if we can find in the complaint any allegations which, under any view of them, may give the plaintiff a right to recover."

It is true, as stated by the learned judge, in denying the application for a new trial, that some of the allegations in this complaint, are to an action *ex contractu*, others of them to an action *ex delicto*. It is also true that such pleading is not to be commended, is incongruous, at variance with all our notions of system, order, and arrangement in pleading. But, under the Code, must we not tolerate pleadings as objectionable as this? If we find, in view of the contract, the advances of money, the illegal sale, the accounting—the facts, taken as a whole—that the plaintiff has suffered, must he not have judgment? If the pleader call the action one thing may we not treat it as another thing, rather than turn a party who, confessedly, upon those facts, ought to recover in some form, over to the delay and expense of a new action?

It has been held that the pleader's misconception

Read *v. Lambert.*

of the cause of action is not material if the facts warrant a recovery (10 *N. Y.* [6 *Seld.*], 56), also, that if the nature of the action be doubtful, the demand for judgment may be consulted to ascertain the action intended (11 *Barb.*, 595), and yet again, that the defendant having answered, the demand for relief becomes immaterial (12 *N. Y.* [2 *Kern.*], 341).

This complaint closes by demanding judgment for a certain sum, and is consistent with the idea that the cause of action arose on contract. We might so regard the complaint, although a conversion was alleged, and the summons was for relief (42 *N. Y.*, 83).

The Code has made liberal provision for enforcing the amendment and correction of pleadings; even for improving the imperfect and ill arranged statements of the facts, or making them more definite and certain, by motion at the instance of the defendant. Where those remedies are not resorted to, and on issues joined the case comes up for trial, we are to be astute in spelling out from the facts at large, or from such of them as may be pertinent, a cause of action or defense.

I am, therefore, constrained to differ from the views entertained by the learned judge when he dismissed the complaint and denied the application for a new trial; and, with the concurrence of Judge McCUE, the judgment appealed from must be reversed and a new trial granted, costs to abide the event.*

Judgment reversed.

* By arrangement of counsel the judgment was entered as upon a money demand on contract.

O'Leary *v.* Walter.

O'LEARY *against* WALTER.

City Court of Brooklyn, General Term, June, 1871.

MARRIED WOMAN.—LEVY ON PROPERTY CLAIMED BY WIFE.—ESTOPPEL.

In an action by a wife to recover for a levy of an execution against her husband, on property claimed by her, it appeared that business was done ostensibly by the husband, but it was alleged that the capital was wholly furnished by the wife, and he received no compensation except board and clothing. *Held*, that the question of fraudulent intent in such an arrangement was one for the jury.*

* See also *Kluender v. Lynch*, 4 *Keyes*, 361. The following recent cases illustrate the case in the text.

Where the claim of a wife to chattels seized on execution against her husband, rested simply on allegations that her husband had from time to time made her gifts of money; that she had returned the money to him for investment, as her agent; and he had, as such agent, purchased for her the chattels in question;—*Held*, that this was not enough to sustain her title. To make such a gift valid, there must be a change of possession and control (*Little v. Willets*, 55 *Barb.*, 125; S. C., 27 *How. Pr.*, 481).

Where husband and wife separate, the husband transferring property to a third person for her use, the transfer being followed by possession, the courts will uphold the *transfer*, except as against then existing creditors; and the permission of the husband to the wife to carry on business on her own account, does not render him liable for her purchases therein on credit (*Ct. of Appeals*, 1868, *Griffin v. Banks*, 37 *N. Y.*, 621).

If a husband duly authorizes his wife to dispose of certain of his property as if it were her separate estate, he cannot revoke the power after its execution by her, conferring interests upon third persons who will be prejudiced by such revocation. Nor can subsequent creditors of the husband object to the validity of such a transfer made by her (*Ib.*).

In an action by a wife against a sheriff for a levy, she was permitted to prove that the farm, the produce of which was levied on under an execution against her husband, belonged really to herself; that it

O'Leary *v.* Walter.

The actual ownership is first to be determined in such cases, and then (if found to be in the wife), the question whether the management has been such as to estop her from asserting her ownership as against the husband's creditors.

In such cases the husband's course of conduct in the management of

was conveyed to her husband by mistake, and the mistake had been corrected by a transfer of the title to her. Under such circumstances, the title, while nominally in the husband, was a mere naked title without interest, and not bound by a judgment against him (*Supreme Ct.*, 1868, *Garrity v. Haynes*, 53 *Barb.*, 596).

Upon a purchase of cows at the request of a wife who owned a farm, the husband and another person, both acting as her agents, gave their note for them.

Held, that in the absence of proof of fraud, the property was in the wife, as against the execution creditors of the husband, levying even before the wife had paid the note (*Ib.*).

A wife's title to a farm owned by her, and carried on by her and a minor son, was cut off by a foreclosure; and while she was holding over, in the absence of her husband, she sold crops which they had harvested before judgment, to the plaintiff;—*Held*, that in the absence of proof of fraud, plaintiff acquired a good title to the crops sold, as against the purchaser of the land at the foreclosure sale (*Ct. of Appeals*, 1867, *Van Etten v. Currier*, 3 *Keyes*, 329; affirming 29 *Barb.*, 644, *sub nom. Van Ellen v. Carrier*).

The fact that the crops were raised in part, by the labor of herself and a son of her husband did not affect her title to them (*Supreme Ct.*, 1859, *Van Ellen v. Carrier*, 29 *Barb.*, 644).

As to the mode of conveying, it was held in *Lockwood v. Cullin*, that the rule that to make an effectual gift to a married woman, as her separate property, there must be something on the face of the instrument transferring the property, indicating the intention of the giver to vest the property in the donee as her sole and separate estate, and to exclude the husband from any participation therein,—has no application where the husband is himself the giver, during coverture; but in such case the bare fact of his making the gift is as strong evidence of his intent that it shall be the sole and separate property of his wife as any declaration in writing would be (4 *Robt.*, 129).

In an action by a purchaser for value from a married woman, of land which her husband purchased, but which was conveyed to her in her own name, and which she afterward conveyed to plaintiff, the action being brought to recover possession of the land, neither a parol agreement between the husband and the wife, though made be-

O'Leary *v.* Walter.

the business is a proper subject of investigation, and evidence on that point is admissible.

The intention of the married women statutes was to encourage and protect those unhappy in their marital relations.

Though the husband may act as her agent, he may not be her unpaid servant while defrauding his creditors.

fore the plaintiff's purchase, that the land should be considered as belonging to a child of the husband and wife, and should be held by the husband in trust for the benefit of such child, nor the fact that the husband procured the conveyance to his wife for the purpose of securing a home for himself and family in case of future misfortunes, forms any defense (Gray *v.* Croquet, 4 *Abb. Pr. N. S.*, 113).

The validity of a deed made by a husband, as a provision or advancement for his wife, to a trustee, since the act of 1848, depends upon the same circumstances of good faith and solvency which would be considered in testing the validity of such an advancement made before that act took effect. Such a conveyance cannot be impeached by a subsequent creditor of the grantor, unless it appears that it was made with a fraudulent intent (Wilbur *v.* Fradenburgh, 52 *Barb.*, 474; Barnum *v.* Farthing, 40 *How. Pr.*, 25).

In respect to the rights of creditors, the general principle is that gifts and voluntary conveyances by a husband to his wife, made without fraudulent intent, at a time when he was indebted to no one, are in equity valid and effectual, and are not to be called in question in a court of equity by his subsequent creditors. Subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time (Phillips *v.* Wooster, 36 *N. Y.*, 412; S. C., 3 *Abb. Pr. N. S.*, 475, and cases cited; and see Holmes *v.* Clark, 48 *Barb.*, 237).

See also Mattingly *v.* Nye (8 *Wall.*, 370), where a voluntary settlement for the benefit of wife and children, made without fraud, by one not then indebted, was upheld against subsequent creditors.

Where the husband possessing property and credit, and indebted to an inconsiderable amount, most of which was afterward paid, conveyed property to one, who immediately conveyed it to the wife, as a provision for her; and she erected a dwelling, with moneys her husband gave her, for the purpose, in small sums, from time to time, during several years previous,—*Held*, that the circumstances repelled any presumption of fraud arising from the husband's indebtedness at the time of the transfer. And the husband having, after the conveyance to his wife, paid a sum due upon a mortgage which was a lien thereon when he purchased, and which he assumed to pay as part of the pur-

O'Leary *v.* Walter.

Appeal from a judgment.

This action was brought by Eliza O'Leary to recover the value of some property taken by the defendant, Anthony Walter, sheriff of Kings county, on execution, under a judgment recovered against Thomas O'Leary, plaintiff's husband, at suit of one Fredeke.

Defendant claimed that the property belonged to the husband; and on the trial, after a refusal to direct

chase-money,—*Held*, that such payment could not be considered as voluntary, or in fraud of creditors, he being liable to make it (*Wilbur v. Fradenburgh*, 52 *Barb.*, 474).

But, on the other hand, a conveyance by a man about to engage in business, transferring his existing property to his wife, for the purpose of securing it to himself and family, he retaining the possession and the apparent ownership, the conveyance being made in order that the property might not be liable to subsequent creditors whom losses in such business may render him unable to pay, is within the statute which forbids conveyances for the purposes of hindering, delaying, and defrauding creditors, although the grantor be wholly free from debt at the time it was made (Case *v.* Phelps, 39 *N. Y.*, 164).

So, where a debtor transferred his real estate to his wife and children, for a nominal consideration, yet continued in possession without any apparent change of ownership, and continued in business, paying past indebtedness by obtaining new credit, and contracting new debts, until he failed in business, the transfer was held fraudulent and void, even as to subsequent creditors. In such case the fraud consists in a design to obtain credit by means of continued possession and apparent ownership, after attempting to place the legal title of his property beyond the reach of his creditors. The fact that he paid up all indebtedness existing at the time of the transfer, by means of credits obtained afterwards, is only a transfer, and not a payment of the then existing indebtedness (*Savage v. Murphy*, 34 *N. Y.*, 508; affirming *S. C.*, 8 *Bosw.*, 75).

The husband's agency in carrying on business does not necessarily affect the wife's rights, but he may be regarded in this respect as a stranger would be if employed in the same way. This rule is sustained by many cases; but the fact that the husband's agency was a continuation of the control he had, before he transferred to her the property in question, may in some cases be held, as was the case in *Little v. Willets* (cited above), to disprove the validity of the al-

O'Leary *v.* Walter.

the jury to render a verdict for plaintiff, the judge charged the jury that the questions of ownership and fraud were for them to consider.

A verdict was rendered for defendant, and plaintiff appealed.

William L. Gill, for plaintiff, appellant.

Crooke, Bergen & Clement, for defendant, respondent.

BY THE COURT.—NEILSON, J.*—The plaintiff, having purchased, as she alleges, with her own means, premises on Classon-avenue, had a saloon, professedly carried on for her own benefit. She claims that her husband acted for her in the business. A small sign, with his name on it, was up in the saloon.

The plaintiff had previously had a saloon at the corner of Adams-street, and, for a portion of the time, a partnership with one Henry, the plaintiff's husband acting in that business with the same sign up there. The plaintiff did not personally take part in conducting the business. She says that that saloon was sold out, but that none of the proceeds of that sale went into the saloon on Classon-avenue.

While the Adams-street business was being carried

leged transfer to her, as against his creditors. In *Lockwood v. Cullin* (4 Robt., 129), such a transfer, the husband continuing to act as agent, was held valid as against debtors, the demands against whom were assigned to the wife.

In *Corning v. Lewis* (54 Barb., 51; S. C., 36 How. Pr., 425), it was held that a wife's separate estate cannot be charged for the price of merchandise purchased by her husband, although the sale was induced by fraudulent representations, and the merchandise was used to improve the separate estate, where the purchase and representations were made without the authority, sanction, or knowledge of the wife.

* Present, McCUE and NEILSON, JJ.

O'Leary v. Walter.

on, the plaintiff's husband engaged Fritz Fredeke to repair the billiard tables—gave a note for the amount of the bill, and on that note judgment was obtained against him. Execution having been issued on that judgment, property in the Classon-avenue saloon was seized by the sheriff, and this action was brought to recover that property or its value.

The plaintiff testified that the property belonged to her.

On the trial, the first question was whether the property did really, and in her own exclusive right, belong to the plaintiff; and, in that case, then, *secondly*, whether the business, which she also claims belonged to her, had been so carried on as to lead persons dealing with the concern, or with her husband, to believe that he was the proprietor, so that it would be inequitable to allow her to assert her title as against the creditor.

The plaintiff owned the dwelling where the Classon-avenue saloon was, and resided there. She did not own the Adams-street building, or reside there, and the lease was arranged for, and signed by, her husband.

It does not appear how far he acted in acquiring the property on Classon-avenue, but he did buy out Trabant, by whom the Adams-street saloon had been previously carried on.

The connecting links between the two places are the sign with the husband's name on, used at both saloons, and the continued and active business management of the husband throughout. The business commenced at the first place was continued at the other. It would seem that neither the landlord of the premises in Adams-street, nor Trabant, Fredeke, or the sheriff, had any reason to apprehend that the plaintiff was the proprietor of that business.

It was admitted on the trial that the license to carry on the business in Classon-avenue was in the name of the husband, a married woman not being competent to

O'Leary v. Walter.

obtain such license—a strong circumstance tending to show that the husband was the proprietor.

The separate property of the married woman, and her earnings from her trade, business or labor, are secured to her by our recent statutes; are put beyond the reach of her husband and of his creditors.

The real intent was to give relief to a woman who, while competent to carry on business, and to earn a livelihood, was unfortunate in her marital relations; had a husband idle, intemperate, or improvident.

Under the prior law, however industrious she might have been, her earnings belonged to the husband; and it seemed not only just but consistent with sound policy, that the wife should be encouraged in her efforts to earn something for herself and for her children, and, to that end, be relieved from the disabilities which had repressed and thwarted her efforts. It was the general view of the profession, when those statutes were adopted, that the intent was to secure to a married woman a separate business (the fruit of her skill or labor), as distinguished from that of her husband; that her business would necessarily be separate and apart from that of her husband; not that he would serve and she have the entire benefit. The creditors of the husband have no lien upon his labor or earnings, but they have strong claims to be considered where a fraudulent combination exists between him and his wife.

But, in giving a liberal construction to those statutes, our courts have held, that, in the management of her separate property or business, she may avail herself of the aid of her husband, that she may act by him as her agent (27 *N. Y.*, 277; 33 *Id.*, 518; 35 *Id.*, 294; 36 *Id.*, 600).

That construction is to be accepted. But, in each instance where the business is carried on ostensibly by the husband, secretly by the wife through him, and where they, or either of them, come in conflict with a

O'Leary v. Walter.

creditor, special attention must be given to all the circumstances. It must be considered whether the relation of the wife to the business is not merely formal ; his relation to it actual and with an interest. The intent necessarily enters into the question, and if the transaction be merely colorable—a device to defraud creditors—it finds no countenance in the statute. It is, moreover, highly impolitic to allow the husband and wife to be so engaged in business that they may be able to elect which of them shall come forward as proprietor, according to the promptings of interest in an emergency.

It would seem, also, that the intent was to allow the married woman to engage in business which she could legally carry on, and if she cannot obtain a license to keep a liquor saloon, she is thus far under a disability, operating as a restraint. If, notwithstanding that, she has her husband take out that license for a business to be carried on by him, and necessarily in his name, he, alone, being subject to the excise law, and to the municipal regulations in respect to such places of resort, her claim as proprietor, in a contest with his creditors, is seriously impaired. But, in the very nature of the case, it is difficult, often impossible, for a creditor to impeach the motives of the parties, or to establish a fraudulent intent. That can only be done by such light as the circumstances may reflect from the general course of the business. In this instance the husband had no wages or salary, only his victuals and clothing ; and it seems hard to believe that the legislature intended that the husband might thus be the unpaid servitor of the wife, while his creditor is put at defiance.

The plaintiff testified that she owned the property ; but so also did she testify that the business, at *both* saloons, was carried on for and belonged to her ;—that in Adams-street, where the husband rented the premises in his own name, giving references, and bought

O'Leary *v.* Walter.

out the previous occupant;—and that in Classon-avenue, where the right to transact business was under a license to the husband. Her testimony was to be considered by the jury with reference to all the circumstances.

It was said by DENIO, Ch. J. (27 N. Y., 280), that “if the husband be indebted, there is more or less reason to suspect that such arrangements are adopted as a ‘cover,’” and “whether, in a given case, the transaction is sincere and *bona fide*, or a colorable device to cheat the creditors of the husband, is a question of fact to be determined by the jury.”

In this case there was enough to justify the learned judge in submitting the case to the jury.

Several exceptions were taken on the trial, to which a brief reference may suffice.

Fredeke having stated that he had performed work for Thomas O'Leary at the saloon, that his name was up—was asked: “What did Thomas point out to you? What did he want done?” And to each of the inquiries objection was made, and exception taken to the ruling of the judge. If the action had been against Mrs. O'Leary to charge her with the payment for that work, those inquiries would have been proper. If a married woman confides the management of her business to her husband, he may give directions to others in that business. That is but an incident. A part of the business being the use of billiard tables, and repairs being necessary, it would have been within his province to procure repairs to be made. He had implied power to give directions. Equally were those inquiries proper in this case; they had reference to the character of the business, to his relation and management. The plaintiff says that he managed the business. In that management he could order those repairs, give directions, as he might have done as to a ton of coal needed for use. If, in an action to charge the

O'Leary *v.* Walter.

plaintiff as the principal, the effort had been to put in his declarations to the effect that he was her agent, or if, in this case, the effort had been to show that he said he was the owner of the property, a different principle would have been applicable. But, with some such obvious limitations, it is evident that the husband's course of action in the management of the saloon, and in the business connected with it, was open to investigation.

The exceptions taken to other inquiries which followed were equally untenable.

The questions objected to were as to the doing of the work, and the non-payment. The witness had previously, and without objection, stated that he did the work, and the additional questions referred to matters related to the principal fact,—the performance of the work.

In cases where fraud is alleged, where the secret arrangements of the husband and wife are involved, and his agency questioned, a much more liberal course of inquiry than the counsel taking these objections seems to have considered proper, has generally been allowed. The plaintiff's theory is, that her husband was at the saloon, acting for her, and as her agent. It was competent to contradict that by circumstances, the course of action and dealings; to show that he was acting for himself.

The objections to the testimony as to the part Thomas O'Leary took in the renting of the Adams-street saloon, and the other matters connected therewith, were not well taken. The circumstances tending to illustrate the course of business, the manner in which it was carried on, and his office in it, were proper for the consideration of the jury. With the same view, the lease signed by the husband was properly received in evidence.

Henry, named by the plaintiff as partner for a

O'Leary *v.* Walter.

short time in the business, was asked who had charge of the business, and whether the plaintiff had anything to do with the saloon. The objections taken were not to the form of the questions. It is difficult to conceive how a creditor could ever contest the claim of the debtor's wife, if such inquiries were not allowed. It was one mode of impeaching the plaintiff's claims. As she had sent him out to act, it will not do to say she was not present, and that nothing which occurs in her absence can be given in evidence. It is to be observed that the objections were not stated to be on the ground that, as the proceeds of the Adams-street saloon did not go into the purchase of that on Classon-avenue, or, as there was a distinction in respect to the place and time of keeping the two saloons, nothing occurring at the first place could prejudice the plaintiff in respect to the other place. We need not consider what might have been the ruling of the learned judge if such specific objection had been made.

The request that a verdict should be directed for the plaintiff was properly refused; there was matter for the jury.

It does not become necessary to consider the instructions given to the jury, as only an exception in the most general form was taken.

The judgment should be affirmed, with costs.

Judgment affirmed, with costs.

Matter of Rosenberg.

MATTER OF ROSENBERG.

New York Common Pleas; Special Term, May, 1871.

INVOLUNTARY BANKRUPTCY.

In an application for a discharge from execution against the person (under 2 *Rev. Stat.*, ch. 5, art. 6, tit. 1, § 1), the debtor need not be held to the most perfect recollection, at the time of making up his schedule, of every minute claim, debt, or item of property owned by him.

If, on his examination, he remember those particulars, the court will allow him to amend his petition on the hearing, if satisfied that the omission was not intentional or fraudulent.

If he do not ask leave to amend, and an order denying the application is entered, he must get rid of the order before there can be any proceeding to amend. The order denying the application is the end and proper determination of the proceeding.*

The court acquires jurisdiction of the application only when the person, imprisoned for over five hundred dollars, presents his petition after he has been imprisoned for three months, and these facts must appear in the petition.

Objection to the jurisdiction may be taken as well on a motion to re-hear, as upon the original hearing.

The court has always power to vacate orders, judgments and decrees, entered irregularly and without jurisdiction.

Motion to open order refusing discharge from execution.

S. H. Olin and M. J. Friedlander, for the petitioner.

P. J. Gage, for the objectors.

JOSEPH F. DALY, J.—It appears from the papers read on this motion, that Jacob Rosenberg is charged

* Compare Matter of Thomas, *Ante*, 114.

Matter of Rosenberg.

in execution against his person for the sum of eight hundred and nine dollars and thirty-one cents, issued out of this court; that, by petition dated September 29, 1870, he applied to this court for a discharge, and on November 15, 1870, his application was denied on the ground that, upon his examination in said proceedings, it appeared to the court that his account was incorrect; and an order to that effect was entered.

On April 28, 1871, the prisoner applied for and obtained from this court, *ex parte*, an order giving him leave to move the court, on eight days' notice, for an order opening the order of November 15, 1870, and for a rehearing of the application for discharge, and an order permitting the petition to be amended by inserting therein the claims, the omission of which therefrom was the ground of refusing his application for a discharge. Pursuant to such leave, the petitioner now moves this court upon affidavits of the petitioner and his attorney, the aforesaid order of leave, the proceedings in this action, and the petition of the prisoner for the following relief.

1. For an order opening the order of November 15, 1870, denying the application of the prisoner to be discharged from imprisonment.

2. For a rehearing of said application.

3. For leave to amend the petition of the prisoner, and the inventory thereto annexed, by inserting after the words "Personal Estate, none," the words and figures "except the following: Debts due to petitioner by the following persons;" and here follows a list of debts.

The affidavits of the petitioner show that on his examination upon his application, he had omitted in the account of his estate, in his petition, to state certain debts due him from certain persons; that at the time of preparing his petition and presenting the same to the court, said debts never occurred to his mind; that he

Matter of Rosenberg.

believed said debts uncollectable, the parties indebted being insolvent or having absconded ; that he believed said debts without value, and it was only when questioned on the examination by the attorney for the creditors, that he remembered the existence of the debts ; that his omission to insert them arose entirely through inadvertence, and not from any fraudulent intent, and that he certainly would have inserted them if he had thought of them or either of them before his examination.

The affidavit of the petitioner's attorney shows that he never knew petitioner had any claims whatever, as otherwise he would have advised the insertion of them in the inventory ; also that when the judge presiding in court, who made the order denying the application, was handed the order to sign, he struck out the words "and that his proceedings are not just and fair," saying that it appeared from the examination that the debts had been inadvertently omitted, and that he granted the order without prejudice to a renewal, or words to that effect.

The creditors opposing this motion presented no affidavits. They took the objection that this court had not the power to make the order asked for in any of its parts ; also that the court never obtained jurisdiction of the original proceedings for discharge, because the petition did not show how long the petitioner had been imprisoned, and that, as the court had never acquired jurisdiction of those proceedings, it could not now make an order to open the final order made in those proceedings, nor to amend the petition nor rehear the application.

The first objection will be considered, viz : want of power in the court to reopen the proceedings in any event.

The proceedings are statutory, and instituted under section 1, article 6, chapter 5, title 1, part 2, of the Revised

Matter of Rosenberg.

Statutes. Every step prescribed by the statute must of course be strictly followed, and the prisoner can be discharged only in the manner prescribed by its terms. The first step toward the discharge is the order for an assignment which the court may make "if satisfied that the petition and account of the applicant are correct, and that his proceedings are just and fair;" and finally, if the court is satisfied that "his proceedings are just and fair," his discharge shall be ordered (Statute, §§ 6, 7, 8).

It has been already held in this court that the decision of the court upon such application, to the effect that the petition and account of the prisoner are not correct, or that his proceedings are not just and fair, is conclusive upon the prisoner, unless reversed on appeal, and has the force of an adjudication to the fullest extent; forming a complete bar to any subsequent or new proceedings by new petition for discharge under said act. The reason being that, as the prisoner could only be discharged on proving his petition and account correct, and his proceedings just and fair, a decision against him on those points was conclusive evidence in all courts and in all applications, and could not be explained or corrected in any new proceeding (*Matter of Thomas, 10 Abb. Pr. N. S., 114.*).

It was also decided in the same case, that the only course for the prisoner against whom such a decision had been rendered, was to apply to the court for an order setting aside such order and for a rehearing of the application and amendment of the petition and schedules, if his application had been denied for omission to state property. And this proceeding was followed in that case, and the prisoner, having got leave, amended his petition by adding the property left out, made his assignment, and was discharged.

It must be conceded that this practice is reasonable and unoppressive to the prisoner, as well as just to

Matter of Rosenberg.

the creditor. The object of the statute is to have the whole property of the prisoner turned over to the assignee to satisfy the creditors' demands. It is hardly fair to hold the debtor to the most perfect and unimpeachable recollection, at the time of making up his schedules, of every minute claim or debt or item of property that he owns, particularly if, from long belief in their utter worthlessness, he has discharged them from his mind. If he, on his examination, remember those particulars, he should and will be allowed on the hearing to amend his petition, if the court be satisfied that the omission to insert them was not intentional or fraudulent. This has been expressly held (*Brodie v. Stephens*, 2 Johns., 289; *Matter of Andriot*, 2 *Daly*, 28).

If the debtor do not ask leave to amend on the hearing, and an order is entered denying his application, it is clear that he must first get rid of the order before there is any proceeding pending to be amended, it being regarded that an order denying the application is the end and proper determination of the proceeding, as well as an order granting the application and discharging the prisoner would be, although the statute nowhere speaks of any denial of the debtor's petition, or any formal or informal record of its denial.

It must be remembered that the application for discharge under the statute is a proceeding in court, and addressed to the court. It may be addressed to the court from which the execution issued, or to the court of common pleas of the county in which the debtor is imprisoned (same statute, § 1). The power and authority of all courts of record, proceeding according to course of the common law, over orders and judgments, is inherent and coextensive with the remedy necessary to be applied in case of any injury or apprehended failure of justice. It cannot be doubted that this court possesses the power, in proceedings under

Matter of Rosenberg.

the statute in question, to set aside an order, final or otherwise, procured by fraud or misrepresentation, or by default. The entry of an order denying the prisoner's application is, as I have said, unwarranted by the statute, but the authority to make it is implied from the authority of the court under the statute to make an order granting the application, and from the general authority of courts to make record of their determinations. It is also true that the statute gives no authority for an appeal from the decision of the court in granting or refusing the application, yet an appeal will lie to the general term from such order, and the general term will affirm or reverse it. The power of the court below to open and set aside or modify its own order for the furtherance of justice, rests upon the same foundation as the power of the court on appeal to reverse it, viz: the necessity of the case; for without it there would be a failure of justice. I have no doubt of this power, and I regard it as proper to be exercised wherever it appears that the amendment asked for is one which would be allowed upon the hearing of the original application, and that no demand was then made of the debtor to insert the omitted items, which he refused to comply with. The proofs before me, on the petitioner's part, of good faith, and that the debts were inadvertently omitted, are not denied by the creditors, and it does not appear that he was ever asked or ordered to insert them in his petition, or to make an assignment of them. As the order asked for will work no harm to the creditors opposing, more than leave to amend would have caused them on the original hearing, I think it a proper case for the exercise of the power of the court.

But on setting aside the order of this court made November 15, 1870, and reopening the application for a rehearing, the objection taken in the second place by the creditors is to be considered. This is, that the court

Matter of Rosenberg.

had no jurisdiction of the application in the first place, because the petition failed to state that the prisoner had been imprisoned over three months, he being charged for over five hundred dollars (*Brown v. Bradley*, 5 *Abb. Pr.*, 141; *People v. White*, 14 *How. Pr.*, 498; *Frees v. Ford*, 6 *N. Y. [2 Seld.]*, 176; *Castellanos v. Jones*, 5 *N. Y. [1 Seld.]*, 164).

The petition before me shows the objection to be well taken. It states the debt to be eight hundred and nine dollars and thirty-one cents, but does not show how long the debtor has been imprisoned. The court acquires jurisdiction of the application only when the person imprisoned for over five hundred dollars presents his petition after he has been imprisoned for three months.

The point or objection to the jurisdiction was not taken originally on the hearing on the petition, but as it is jurisdictional, may be taken when the application is again under consideration. My view is that the petition should have been dismissed, originally, for want of jurisdiction, and should be so dismissed on granting the motion to rehear.

The third objection by the creditors, that because the court had no jurisdiction of the original proceeding for the reason above set forth, and had no authority to make the order refusing the discharge on the merits, this court has no power now to set aside the latter order, hardly requires notice. The court has always power to vacate orders, judgments and decrees entered irregularly and without jurisdiction.

An order should be entered opening and setting aside the order of November 15, 1870, in these proceedings, but denying the motion to amend, and, reciting the creditors' objection on the ground of want of jurisdiction, a further order dismissing the proceedings had under the petition of September 29, 1870.

As both parties have on this application in a measure prevailed, no costs will be allowed to either.

Fisk v. Union Pacific R. R. Co.

FISK *against* UNION PACIFIC RAILROAD COMPANY.*

United States Circuit Court, Southern District of New York, February, 1871.

REMOVAL OF CAUSES.

Under the act of Congress of July 27, 1868,—providing for the removal by corporations, &c., of suits brought against them, from State courts, to United States circuit or district courts, upon verified petition, stating a defense, arising under the United States Constitution, &c.,—the truth of defendants' averment that they have such a defense, must be settled at the trial, and cannot be tried on affidavits.

Where there are several defendants, they need not all join at the time of presenting the petition, but each, or as many as see fit, may, without waiting for others, present the petition and otherwise comply with the requirements of the act.

No affidavits can be read in opposition before the State court. The application on the petition is *ex parte*, and depends on the papers upon which it is founded; and if they are regular and sufficient, the court has no discretion.

When one or more of the defendants have presented a petition, under that act, and thus initiated the removal, it is not competent for the State court to take any proceedings in the cause, other than to perfect the removal, as other parties defendants may appear and present their petitions.

The joinder as defendants in the suit, of persons who are not within the limitation prescribed by that act, with those who are, cannot be permitted to withdraw the cause from the jurisdiction of the federal courts.

Motion to dissolve an injunction.

The defendants in this cause, immediately after its commencement, took steps, under an act of Congress, referred to in the opinion, to remove the cause from the

* See note at the end of this case.

Fisk v. Union Pacific R. R. Co.

State courts to the United States court. The justice of the supreme court refused to recognize the removal, and granted several injunctions, and appointed a receiver after the defendants had completed their proceedings to take the cause from his court. The defendants then applied to Judge NELSON to vacate the first injunction, which was granted when the suit was commenced, and before it was removed. The subsequent orders and injunctions in the State court, the defendants claimed, were void, and without jurisdiction. The plaintiff's counsel at the same time made a counter motion to Judge NELSON to remand the case to the State court.

David Dudley Field & E. W. Stoughton, for plaintiff.

S. J. Tilden and James Emott with Clarence A. Seward, for defendants.

NELSON, J.—A bill was filed in this case in the supreme court of the State by the complainant, against the Union Pacific Railroad Company, the Credit Mobilier of America, a corporation of Pennsylvania, and twenty-two other persons. It was filed the forepart of July, 1868; the precise date is not given, nor is the time when it was served upon the respective defendants. On August 3, following, six of the defendants, the Union Pacific Railroad Company, John J. Cisco, William H. Macy, Charles A. Lambard, Sidney Dillon and Thomas C. Durant, presented a petition to the court to remove the cause to the circuit court of the United States for the southern district of New York, under an act of Congress passed July 27, 1868. The act provides that any corporation, or any member thereof, other than a banking corporation, organized under a law of the United States, and against which a

Fisk v. Union Pacific R. R. Co.

suit at law or in equity has been, or may be, commenced, in any court other than a circuit or district court of the United States, for any liability or alleged liability of such corporation, or any member thereof, as such member, may have such suit removed from the court in which it may be pending, to the proper circuit or district court of the United States, upon filing a petition therefor, verified by oath, either before or after issue joined, stating that they have a defense arising under or by virtue of the constitution of the United States, or any treaty or law of the United States, and offering good and sufficient surety for entering in such court on the first day of its session, copies of all process, proceedings, &c., and doing such other appropriate acts as are required to be done by an act of Congress, passed July 27, 1866; and it shall be, thereupon, the duty of the court to accept the surety, and proceed no further in the suit, and the said copies being so entered as aforesaid in such court (of the United States), the suit shall then proceed in the same manner as if it had been brought there by original process, &c. The petition presented to the supreme court of the State conformed in all respects, substantially, to the provisions of the act.

Some question has been made on the part of the learned counsel for the complainant whether the suit is brought against the defendants for a liability or an alleged liability of the Union Pacific Railroad Company, or of any of its members as such; and a critical examination of the bill of complaint, it is claimed, will show that not to be the fact. Our examination of it has led to a different conclusion. If it had been otherwise, however, we are of opinion it would not have deprived the defendants of the benefit of the act, that is, if it had not appeared affirmatively on the face of the bill that the suit was against them for such liability. The defendants have averred in their petition

Fisk *v.* Union Pacific R. R. Co.

that the suit had been brought against them for such cause of action, and, if a question is to be made upon this allegation, it must be settled at the trial and not on affidavits. Section 3 of the act of March 2, 1833 (4 *U. S. Stat. at L.*, 638), provides that in any case where a suit should be brought in a State court against an officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, &c., it shall be lawful for the defendant, at any time before trial, upon a petition to the circuit court of the United States, setting forth the nature of the suit, and verifying the petition, &c., to have the cause entered on the docket of said court. This act, like the one before us, has a limitation upon the privilege of removal; the suit must be against a person for or on account of an act done under the revenue laws of the government, or under color thereof, &c. It cannot be doubted, however, that if no such fact appeared in the declaration, but it was simply for an assault and battery, he could remove the cause by setting forth in his petition that the suit was for the cause stated in the act. Otherwise, the statute could always be evaded by the pleader. We had occasion to examine this third section at large, in *Dennistoun v. Draper* (5 *Blatchf.*, 336, 341), and refer to the case for our views in respect to its provisions.

The only question, in this case, arising out of the act of July 27, 1868, that involves any difficulty, is that in respect to the parties claiming the right to a removal. Are all of them obliged to join in the petition, or may they not apply for it as they are served with process, or otherwise brought into court? In our judgment, they need not all join at the time of presenting the petition, but each, or as many as may see fit, may, without waiting, present the petition, and otherwise comply with the requirements of the act. We perceive no well-grounded objection to this practice,

Fisk *v.* Union Pacific R. R. Co.

but, on the contrary, it may be attended with convenience, and can work no prejudice to either party. The learned counsel for the plaintiff seems to suppose that the solicitor is entitled to notice of the time and place of presenting the petition. But this is an error. The act prescribes no such practice, and it is otherwise under all the previous statutes providing for removals.

No affidavits can be read before the state court in opposition. The application on this petition is *ex parte*, and depends upon the papers upon which it is founded, and if they are regular, and conform to the requirements of the statute, the court has no discretion —the act is peremptory.

We are also of opinion that when one or more of the defendants have presented a petition, and conformed in all respects to the act, and thus initiated the removal, that it is not competent for the State court to take any proceedings in the cause, other than to perfect the removal as other party defendants may appear and present their petitions.

There may, as in the present case, be numerous defendants, and considerable intervals of time between the service of the process, and where it would be expedient that each should be at liberty to take the necessary steps to remove the cause, so far as he was concerned, and in the mean time it would be unfit, and might be a useless waste of time and expense to all parties concerned, to proceed in the litigation until the question of jurisdiction was determined. We agree with the ideas of the counsel for the defendants, that the fact that questions may arise in the course of the litigation besides those under the acts of Congress, and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the Federal courts. This principle was settled in *Osborn v. Bank of the United States*, and has been recognized as

Fisk *v.* Union Pacific R. R. Co.

the settled law of the court ever since. Nothing can be added to the conclusiveness of the reasoning of Chief Justice MARSHALL upon the point in that case. He observes: "If this were sufficient to withdraw a case from the jurisdiction of the Federal courts, almost every case, although involving the construction of a law, would be withdrawn, and a clause in the constitution relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely a case every part of which depends on the constitution, laws or treaties of the United States" (9 *Wheat.*, 738).

For the same reason, we are of opinion that the joining of defendants in a suit, not within the limitation as prescribed by the act, with those who are, cannot be permitted to withdraw the cause from the jurisdiction of the Federal courts. If this were permitted, the privilege extended to the parties setting up a right under the constitution and laws of the United States would in most if not in every instance be defeated. Indeed, if any such principle could be admitted, most of these acts of removal depending principally upon the subject matter, and intended to secure the interpretation of the constitution and laws of the United States, at the original hearing, to its own judiciary, would be futile and worthless.

The act of 1833, which provided for the removal of suits against an officer of the United States, or other person, for acts done under the revenue laws, could be readily evaded by joining one or more persons with him not acting in that capacity. If these outside parties are deemed material, or are really material, to a complete remedy in behalf of the plaintiff, they must be regarded as subordinate, and incidental to the principal litigation in respect to which the act of Congress has interposed the remedy of removal. In this way the

Fisk *v.* Union Pacific R. R. Co.

right of the parties to have their defense under the constitution or laws of the United States tried in the Federal courts is secured, and, at the same time, the remedy of the plaintiff is unimpaired.

It appears from the papers before me, that a second petition was presented in the State court by all the defendants, not included in the first, on March 27, 1869, and the proper order entered for the removal. There appears to have been a full compliance with the terms of the act. It is objected that the judge before whom the petition was presented was not sitting in court, but at chambers, when the papers were presented and the order of removal made. But the affidavits before me show that the proceedings took place before the supreme court. It also appears that the order, duly certified by the clerk of the court, was produced before Judge BLATCHFORD, on the return of the alternative mandamus, by the counsel for the defendants in that proceeding, as an answer why the peremptory writ should not issue, as showing that the cause was already in the circuit court, and, therefore, the writ would be useless.

The clerk will enter an order in conformity with this opinion, if Judge BLATCHFORD concurs in the result; and will, also, enter an order, on the motion of the defendants before me, to dissolve the injunction of July 17, 1868, granted by the State court.

BLATCHFORD, J.—I concur in the views of Mr. Justice NELSON, and in the result that the motion of the plaintiff to remand the cause to the State court must be denied.

Order accordingly.

NOTE.—This decision, although not made by a court of this State, determines the practice in the State courts, in proceedings there for removal of causes to the courts of the United States; and on account of its importance to practitioners in the State courts, it is here re-

Fisk *v.* Union Pacific R. R. Co.

ported. The following summary of the cases which have arisen in State courts will be of interest in connexion with it.

It has generally been held, under the previous acts of Congress, that the jurisdiction must attach as to all parties in order to authorize the removal. *Miller v. Lynde*, 2 *Root*, 444; *Heirs of Ludlow v. Heirs of Kidd*, 3 *O.*, 48; *Hubbard v. Northern R. R. Co.*, 25 *Vt.*, 715; *Tibbatts v. Berry*, 10 *B. Monr.*, 473, 490.

Troubat & Haly's Practice, Wharton's Ed., p. 161, says, If there are two defendants, the petition must be by both, or the cause cannot be removed.

The following cases further illustrate this rule :

To authorize the removal of an action from a State court to a circuit court, under the judiciary act, all the plaintiffs must be citizens of the State in which the suit is brought, and all the defendants must be citizens of some other State or States. *2nd Circ. (Vt.)*, 1853, *Hubbard v. Northern R. R. Co.*, 3 *Blatchf.*, 84; *S. C.*, 25 *Vt.*, 715; and *7 Law Rep. N. S.*, 316. *S. P.*, *7th Circ. (Ind.)*, 1848, *Wilson v. Blodget*, 4 *McLean*, 363.

If there be two defendants in the State court, the cause cannot be removed into the circuit court upon the petition of one of the defendants. *3rd Circ. (Pa.)*, 1822, *Beardsley v. Torrey*, 4 *Wash. C. Ct.*, 286. *S. P.*, *2nd Circ. (N. Y.)*, 1825, *Ward v. Arredondo*, 1 *Paine*, 410. See *Smith v. Rines*, 2 *Sumn.*, 238.

The complainant in a bill of interpleader is not, before being discharged by a decree that the defendants interplead, to be deemed a mere nominal party; and though the defendants are citizens of different States, the cause cannot be removed to the United States court before such decree, if one of the defendants is of the same State with the complainant. [1 *Paine C. Ct.*, 410.] *V. Chanc. Ct.*, 1833, *Leonard v. Jamison*, 2 *Edw.*, 136.

The provisions of the judiciary act, relative to the removal of causes from State to Federal courts, do not authorize a removal of an action brought against more than one defendant, if any defendant is a citizen of the State in which the action is brought. *N. Y. Supreme Ct. Sp. T.*, 1868, *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 3 *Abb. Pr. N. S.*, 453; *S. C.*, 53 *Barb.*, 472.

In applying acts of Congress authorizing removal of a cause in which the "plaintiff" or "defendant" is a citizen, to a case in which several persons are plaintiffs or defendants, it is requisite that all the plaintiffs or defendants should be citizens. *Ib.*

A resident of another State, sued in the courts of this State, is not entitled to a removal of the cause to the United States courts, under

Fisk *v.* Union Pacific R. R. Co.

the act of 1789, § 12, if the plaintiffs are not citizens of this State. *N. Y. Com. Pl. Sp. T.*, 1864, *Smith v. Butler*, 38 *How. Pr.*, 192.

In an action of tort against several, one only being served, and the others returned not found, the one served may alone petition for a removal. *N. Y. Supreme Ct.*, 1847, *Norton v. Hayes*, 4 *Den.*, 245.

Who may move. The name of one defendant cannot be struck out on motion of the other, without notice to the former; but where the latter is a citizen of another State, and there is no joint trust, interest, duty, or concern, in the subject-matter of controversy, he may be allowed to appear and defend alone, so as to enable him to remove the cause. *Chancery*, 1819, *Livingston v. Gibbons*, 4 *Johns. Ch.*, 94.

If the capias is served on one only, all the defendants must appear in the State court, when asking for a removal of the cause. Instead of putting in special bail, they may give security to appear and put in bail in the United States court. *N. Y. Supreme Ct.*, 1845, *Suydam v. Smith*, 1 *Den.*, 263.

Where a bill in chancery was filed in a State court by a citizen of that State, against parties some of whom resided in that State and some in another State, and the latter removed the cause into the circuit court of the United States, and that court, after answer filed, remanded it to the State court, and the real parties in interest were those residing out of the State,—*Held*, that the order remanding the cause to the State court was erroneous. *U. S. Supreme Ct.*, 1855, *Wood v. Davis*, 18 *How. U. S.*, 467.

Under the judiciary act, which authorizes the "defendant" to file his petition for the removal of the cause,—the persons who compose the party defendants should join in the petition, and one party defendant should not be permitted to change the jurisdiction without the consent of his co-defendants, for if the petition succeeds the whole cause must be removed. It cannot be removed in part. If it go, it must go as a whole. "The right to question the jurisdiction is personal to the very parties over whom it is alleged the court has no jurisdiction. Their co-defendants cannot plead it, or demur, or move to dismiss." [4 Ga., 592.] Under the act of Congress of 1789, all the parties defendants, who have been brought before the court, by service, in any manner, must join in the petition to remove the case from the jurisdiction in which it was instituted, and that one defendant cannot transfer the jurisdiction for any other, any more than he could for that other, object to the jurisdiction. *Bryan v. Ponder*, 23 *Ga.*, 480.

To authorize a transfer of an action, in which there are several defendants, from a State court to the United States court, under the provisions of the judiciary act of 1789, on the ground of the alien-

Fisk *v.* Union Pacific R. R. Co.

age of parties defendant, all of the defendants must be within the description of the persons entitled to a transfer, and all must join in the application. *Calderwood v. Hager*, 20 *Cal.*, 167. Opinion by FIELD, Ch. J.

If all the defendants have been served and have appeared, all must join in the petition for a removal. *Shelby v. Hoffman*, 7 *Ohio St.*, 450.

Where the jurisdiction of a court depends on the party, it is the party on the record only that the court will look at. *Sharps' Rifle, &c. Co. v. Rowan*, 34 *Conn.*, 329.

In a suit brought in a State court of Wisconsin, by a citizen of the State of New York, as trustee of a married woman who was a resident of Wisconsin, against a citizen of Illinois, an application by the defendant, under the judiciary act of 1789, for a removal of the cause into the United States court, on the ground that the married woman was the real party in interest,—*Held*, to be properly denied. *Mead v. Walker*, 15 *Wis.*, 499.

A party plaintiff, who, although not indispensable to the maintenance of a bill in equity, is nevertheless entitled on the face of the bill to a decree, cannot, for the purpose of removal, be regarded as no party to the bill. *It seems*, that the criterion of a mere nominal party, for such purpose, is, whether the party is entitled or subject to a decree. Therefore, where such a party was co-plaintiff with others, but not, like them, a citizen of the State in whose court the suit was brought, his presence was held fatal to a petition by the defendants for the removal of the cause into a circuit court of the United States, although, but for this objection, they would have been entitled to remove it. *James v. Thurston*, 6 *R. I.*, 428.

A Massachusetts creditor had obtained an execution in the courts of Rhode Island, against his debtor, who was a citizen of the latter State. An assignee of the debtor, for the benefit of his creditors, who was a citizen of Rhode Island, filed a bill in the court of the latter State against the creditor who had obtained the execution, and against the officer who was also a citizen of Rhode Island, charged with the service of it, to establish his trust, and to enjoin the sale of the trust property levied upon by the execution. Upon a petition by the execution creditor to remove the bill into the circuit court of the United States for the Rhode Island district,—*Held*, that the officer was not a formal, official, or necessary party to the bill, so that his being a co-defendant could be disregarded by the court in considering whether the applicant was entitled to the jurisdiction which he invoked; and that the petition must be dismissed. *Nye v. Nightengale*, 6 *R. I.*, 439.

Fisk *v.* Union Pacific R. R. Co.

Alienage. In a suit between aliens, the declaration by the plaintiff of his intention to become a citizen of the United States does not entitle the defendant to a mandamus, to have the cause removed to the United States court. Such alien does not become entitled, until the final naturalization oath has been taken, to the right of citizenship necessary to give jurisdiction to the United States in such a case. [Citing 4 Dallas, 12; 4 Cranch, 46; 5 Id., 303; 2 Peters, 136; 3 Wallace Jr., Bright. Dig., 9, note h.] *Orosco v. Gagliardo*, 22 *Cal.*, 83.

Counter-claim. Where the plaintiff in an action, after the filing of a counter-claim by the defendant, a municipal corporation, dismissed his suit, and then asked for and obtained an order transferring the action to the United States circuit court,—*Held*, that as the plaintiff had elected to bring his suit in the State court, he had no right, under the judiciary act of 1789, to have it transferred; the right to remove, in cases like this, being confined to suits commenced in the State courts “against an alien, or by a citizen of the State in which the suit is brought, against a citizen of another State.” *City of Aurora v. West*, 25 *Ind.*, 148.

The question whether corporations are citizens within the rule has given rise to some conflict of decision, but it may now be deemed settled, upon the authority of the later decisions of the supreme court of the United States, in reference to the application of rules of jurisdiction to corporations, that a corporation created by the law of any State is conclusively presumed, for the purposes of jurisdiction, to be composed of citizens of such State; and the right of the corporation to the removal of an action against it from the court of any other State to a court of the United States, is not affected by the fact that it had appointed, within the State where the suit was brought, an agent for the service of process on it, according to the laws of such State, nor by the fact that a portion of its directors reside within such State. [34 N. Y., 205; 3 Abb. Pr. N. S., 357; 3 Metc. 564.] *Ct. of Appeals*, 1869, *Stevens v. Phoenix Ins. Co.*, 41 N. Y., 149; reversing 24 *How. Pr.*, 517; *Supreme Ct. Sp. T.*, 1868, *Fisk v. Chicago, Rock Island, &c. R. R. Co.*, 3 *Abb. Pr. N. S.*, 453; *S. C.*, 53 *Barb.*, 472.

A corporation created by the laws of one State, and having its principal place of business and holding its meetings there, must be regarded, for purposes of jurisdiction, as a citizen of that State, although its business consists of traffic between that State and another. [Reviewing cases.] *N. Y. Superior Ct.*, 1868, *Kranshaar v. New Haven Steamboat Co.*, 7 *Robt.*, 356.

A railroad corporation of one State, which is authorized by a law of another State to extend its track into the latter, and do business therein, is still a citizen of the former, and not of the latter State.

Fisk *v.* Union Pacific R. R. Co.

N. Y. Com. Pl., 1856, Dennistoun *v.* N. Y. & New Haven R. R. Co., 1 *Hilt.*, 62; S. C., 2 *Abb. Pr.*, 415, 278.

A suit brought by aliens, jointly with a citizen of the State, against one who is a citizen of the United States and of another State, is not removable under the act. *Ib.*

A corporation is a citizen, within the meaning of section 12 of the judiciary act, authorizing the removal of causes. 2nd *Circ. (N. Y.)*, 1862, Barney *v.* Globe Bank, 2 *Am. Law Reg. N. S.*, 221.

In an earlier case it was held that an action in which a corporation is a party, if some of the corporators are citizens of the same State with the adverse party, cannot be removed. [3 *Cranch*, 267; 5 *Id.*, 57, 61; 1 *Wheat.*, 91; 3 *Id.*, 591.] *Chancery*, 1821, North River Steamboat Co. *v.* Hoffman, 5 *Johns. Ch.*, 300.

Actions commenced in the courts of this State, by one foreign corporation against another, cannot be removed under the act of 1789. *N. Y. Supreme Ct.*, 1866, Ayers *v.* Western R. R. Corp., 48 *Barb.*, 132; S. C., 32 *How. Pr.*, 351.

But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this State, the action may be removed,—provided the claim is of such a nature that the United States can take cognizance of it. *Ib.*

A joint stock company, having power by the law of a State to sue or be sued in the name of an officer representing it, is to be regarded, in a suit so brought, as a citizen of the State the law of which confers the power; this is upon the principle applied to corporations. *N. Y. Supreme Ct.*, Fargo *v.* McVicker, 38 *How. Pr.*, 1.

Proceedings against joint debtors where a part only are served, give rise to an exception.

In Vandervoort *v.* Palmer (4 *Duer*, 678), it was held that in an action against partners the one defendant who is served may petition and give bond alone. But the decision was put expressly upon the ground that under the New York statute the plaintiff could proceed to judgment without bringing in any other defendant.

In Norton *v.* Hayes (4 *Den.*, 245), it was held that in an action of tort against several, one only being served and the others returned not found, the one served might alone petition and give bond for a removal.

But the decision was put expressly upon the ground that the plaintiff having filed a declaration on service of one tortfeasor, only, without taking any steps to bring in the others, the action had become an action against the one served, as sole defendant.

In another case the plaintiff, a resident of this State, sued in a State court three defendants, of whom one was also a resident of this State,

Fisk *v.* Union Pacific R. R. Co.

and the other two were residents of other States. The action was upon joint indebtedness; and upon service of summons on the resident defendant alone, plaintiff obtained judgment against all, and afterwards served the other defendants with summons to show cause why they should not be bound by the judgment, under section 375 of the Code. *Held*, that the defendants, so summoned, were not entitled to have the cause removed into a Federal court, on the ground of their residence. Such proceeding is not a new action against only the defendants so served, but is a further proceeding in the old action; and where there are several defendants, real parties in interest, each of them must be a resident of a different State from that of the plaintiff, to entitle a defendant to have the cause removed to a Federal court. [14 Pet., 60; 4 McLean, 363; 1 Paine, 401.] *N. Y. Superior Ct. Sp. T.*, 1859, *Fairchild v. Durand*, 8 *Abb. Pr.*, 305.

Special and equitable proceedings. Another exception has been sometimes recognized in the case of equitable proceedings somewhat peculiar and special in their nature, where it has been held that the courts of the United States will decline jurisdiction in cases where the courts of a State are acting in their ordinary jurisdiction as *courts of equity*,—*e. g.*, in the case of directing an administrator in the execution of his trust,—where the right of citizens of the State as well as of non-residents are involved, and the non-residents are made parties in the mode pointed out by the laws of the State.

In such a case the United States courts will adhere strictly to the rule which leaves to the court which first takes jurisdiction of the matter its final decision. *U. S. Circuit Ct. Md.*, (1856 ?) *Presbyterian Church v. White*, 4 *Am. Law Reg.*, 526.

Section 12 of the act of 1789, does not authorize removal of suits in progress from an inferior to a superior court of the State, nor does it apply to proceedings for the probate of a will. *Tibbatts v. Berry*, 10 *B. Monr.*, 473, 490.

A suit in equity to enjoin defendant from prosecuting an action which he has brought in a court of law of the State, is in reality an equitable defense to his action, and he is not entitled to have it removed. No proceeding should be removed unless the United States court has jurisdiction of the subject matter, and power to do substantial justice between the parties. *Chancery*, 1828. *Rogers v. Rogers*, 1 *Paige*, 183.

The petition, or affidavit. In reference to the petition and its contents, the following decisions have been made, in which it will be seen there is some conflict, arising chiefly out of the difference in the practice in different States.

A suit at law cannot be transferred from the State to the United

Fisk *v.* Union Pacific R. R. Co.

States courts, whether before or after judgment, merely by consent of the parties. Rodman *v.* Davis, 8 *Jones Law (Ky.)*, 134.

To entitle an alien to remove his suit under the act of 1789, he must comply with the requirements of that act. It is not a compliance with the law to file an exception to the jurisdiction of the court, with a demand for a dismissal of the action, by the defendant, without a petition made by him at the time of his appearance, for the removal of the cause to a court of the United States, and no offer of a surety for his entering the case in that court at the proper time. Webre *v.* Duroc, 15 *La. An.*, 65.

In a petition to remove a cause from a State to a Federal court, under section 5 of the act of Congress of March 3, 1863, the burden is upon the petitioner to make out affirmatively that the case he seeks to remove is of the class described in the act.

And it is enough to bring the case within this act, if he makes out an ostensible or colorable authority of president or Congress. Hodgson *v.* Millward, 3 *Grant's Cas. (Pa.)*, 412.

To entitle a defendant, who is sued for trespass, to a removal of the action from a State court to a court of the United States, under the act of Congress of March 3, 1863,—which provides that any action commenced in any State court against any person, for an act done at any time during the rebellion, by virtue or under an authority from, or exercised by or under the president of the United States or any act of Congress, upon the filing by the defendant of a petition stating the acts and verified by an affidavit, &c.,—it must appear by his own affidavit of facts that the case comes strictly within and is embraced by the act.

And if he permits counter-affidavits to be filed without objection, he must abide the legal result of the issue made by their presentation. Short *v.* Wilson, 1 *Bush (Ky.)*, 350.

The petition must not only state the facts mentioned in the statute, but also every other fact necessary to show that the circuit court would have jurisdiction. Calcord *v.* Wall, 2 *Miles*, 459.

The affidavit, on moving to remove a cause into the United States circuit court, must state that the party is a citizen of another State. To say that he is a resident is not enough. *N. Y. Supreme Ct.*, 1808, Corp *v.* Vermilye, 3 *Johns.*, 145.

The court must be satisfied as to the petitioner's alienage or citizenship in another State, as well as in respect to the amount in controversy. *N. Y. Superior Ct. Sp. T.*, 1858, Disbrow *v.* Driggs, 8 *Abb. Pr.*, 305, note.

Averment of "residence" instead of citizenship is a fatal defect.

Fisk *v.* Union Pacific R. R. Co.

Eastin v. Rucker, 1 *J. J. Marsh.*, 232. *S. P., Beebe v. Armstrong*, 11 *Mart.*, 440.

Under the act of 1789,—that if a suit be commenced against a citizen, &c.,—it is essential that the petition allege that defendant was a citizen at the time the action was commenced. Alleging citizenship at the present time is not enough. *Savings Bank of Cincinnati v. Benton*, 2 *Met. (Ky.)*, 240. So also under the act of 1863. *People v. Western Transportation Co.*, 34 *Ill.*, 356.

The petition must be verified; but in this case a petition presented without verification was granted on a subsequent day, on an affidavit being then read. *Ogden v. Baker*, 1 *Greene (N. J.)*, 75.

The petition may be verified (under the judiciary act) by an agent. *Vandevoort v. Palmer*, 4 *Duer*, 677. But see *Kirkpatrick v. Hopkins, 2 Miles*, 277 (above).

Where the application is made by a corporation, the affidavit must be by an officer authorized to make it. A secretary is not presumed to be authorized, for it is not an act within his ordinary powers or duties. *Dodge v. Northwestern Packet Co.*, 13 *Minn.*, 458.

Filing. The petition must be *filed*, at the time specified by the statute, in order to entitle the petitioner to a removal. Serving the petition on plaintiff with notice of presenting it, followed by the filing of the petition on moving at a subsequent term, is not enough. *Redmond v. Russell*, 12 *Johns.*, 153. (In this case the dissenting opinion concedes that the filing the petition and the giving security are considered by the statute as simultaneous acts.)

According to *Troubat & Haly's Pr.*, (Whart ed., 162,) the practice is, after filing the petition and bond, to give notice of motion.

The agreement of the State court to consider the petition as filed of a preceding term, when the appearance was entered *nunc pro tunc*, cannot give jurisdiction, when the court see, that in point of fact, it was not filed till a subsequent term. 3rd *Circ. (N. J.)*, 1810, *Gibson v. Johnson, Pet. C. Ct.*, 44. S. P., 2nd *Circ. (N. Y.)*, 1825, *Ward v. Arredondo, 1 Paine*, 410.

Notice of motion. The New York superior court does not grant an order of removal without notice, or an order to show cause. *N. Y. Superior Ct. Sp. T.*, 1858, *Disbrow v. Driggs*, 8 *Abb. Pr.*, 305, note.

Notice must be given to plaintiff, if the defendant intends to move for the removal of an action from a State court to the United States judiciary act of 1798. The appearance required is not merely an entry in the minutes of the court, but the defendant should give notice of retainer as required, to constitute an appearance in the courts of this State. *N. Y. Supreme Ct.*, 1867, *Bristol v. Chapman*, 34 *How. Pr.*, 140.

Fisk *v.* Union Pacific R. R. Co.

The allegations of a petition for the removal of a cause from a State court to a court of the United States, under the provisions of the *judiciary act*, are not deemed conclusive, but may be controverted by the plaintiff. *N. Y. Superior Ct. Sp. T.*, 1867, New York Piano Co. *v.* New Haven Steamboat Co., 2 *Abb. Pr. N. S.*, 357. (But see the case in the text.)

A less strict rule in regard to the contents of the petition has been laid down in some cases. Thus, in *People v. Western Trans. Co.*, 34 *Ill.*, 356, it was held, that the petition to be filed for the removal of a cause from a State court to a court of the United States, under the act of Congress of September 24, 1789, is not required to state the alienage or citizenship of the parties, or the amount in controversy; nor need the petition be verified in any manner. The petition is by the act required to contain a prayer for the removal of the cause, but it is not essential that it should contain a statement of the facts upon which the removal is sought.

The facts upon which a petitioner bases his right to removal of a cause from a State to a Federal court, must be made to appear to the satisfaction of the State court, but no particular mode is described. It may be made by admission of parties, by affidavit, or by testimony of witnesses.

Although it may be assumed that a petition for removal should contain the facts necessary to authorize a removal, the accidental omission of a material fact may be supplied on appeal in order to sustain an order granting the application. *Field v. Blair*, 1 *Code R. N. S.*, 361.

It is not indispensable, in order to warrant the removal of a cause, that the requisite facts as to the alienage or citizenship of the defendant should appear by the writ or other papers filed in the State court. *1st Circ. (Mass.)*, 1847, *Ladd v. Tudor*, 3 *Woodb. & M.*, 325.

The bond to remove a cause from a State court to the circuit court of the United States, should be several as well as joint. *N. Y. Superior Ct.*, 1829, *Roberts v. Cannington*, 2 *Hall*, 649.

Where, in a suit commenced by declaration claiming fourteen thousand dollars, the defendant was not held to bail, a bond in the penalty of one thousand dollars was held sufficient security for defendant's appearance in the circuit court of the United States. *Supreme Ct.*, 1834, *Blanchard v. Dwight*, 12 *Wend.*, 192.

The weight of authority is that a bond must be actually offered and filed in order to perfect the petitioner's right to a removal, although there are earlier cases noticed below to the contrary.

The practice is, say *TRoubat & HALY* (speaking of the act of 1789), for the defendant, at the time he puts in bail, to file his petition

Fisk *v.* Union Pacific R. R. Co.

and bond, and give notice of motion for the earliest day in term thereafter, for leave to remove the cause.

The bond must be filed at the time contemplated by the statute (*i. e.*, under the judiciary act, at the time of filing the petition). An *offer to give it*, made in open court on the motion, is not enough; and will be refused by the court even where an imperfect bond has been filed, and the offer is in the nature of an amendment. *Roberts v. Cannington*, 2 *Hall*, 649.

The proper rule as to the tender of security has recently been determined in New Hampshire, as follows:

Where a defendant undertakes to exercise the right to remove his cause from a State to a United States court, by virtue of section 12 of the act of 1789, he must at the time of entering his appearance in the action, which is presumed to be the first term after legal notice, simultaneously file his petition for the removal of the cause, and at the same time offer good and sufficient security for entering the cause in the United States court, of the sufficiency of which security the court must judge. It is not enough to express such an offer in the petition, and to produce the sureties in court at the hearing. *Robinson v. Potter*, 43 *N. H.*, 188.

The petition should be denied if the defendant does not offer surety "at the time of entering his appearance." It is not enough to make a subsequent verbal declaration on the hearing that he has the surety ready. *Kirkpatrick v. Hopkins*, 2 *Miles*, 277.

A case is "made out," when the proper facts are shown, and the defendant has filed a proper bond with sufficient surety. The act confers on the defendant the right to remove the suit, *by filing his petition and bond*, and it makes all subsequent proceedings of the State court erroneous. *Kanouse v. Martin*, 15 *How. Pr.*, 197.

It is the practice in this State to tender the bond to the court at the time of application for removal, or to file it previously.

See the following cases, where this appears by the report:

Jones v. Seward, 17 *Abb. Pr.*, 377; *Patrie v. Murray*, 43 *Barb.*, 323; *Anderson v. Manufacturers' Bank*, 14th *Abb. Pr.*, 436; *Cooley v. Lawrence*, 5 *Duer*, 605; *Fairchild v. Durand*, 8 *Abb. Pr.*, 305; *Vandevoort v. Palmer*, 4 *Duer*, 677; *Norton v. Hayes*, 4 *Den.*, 245; *Suydam v. Smith*, 1 *Den.*, 263; *Roberts v. Cannington*, 2 *Hall*, 649; *Blanchard v. Dwight*, 12 *Wend.*, 192; *Carpenter v. N. Y. & N. Haven R. R. Co.*, 11 *How. Pr.*, 481; *Field v. Blair*, 1 *Code R. N. S.*, 292, 361; *Durand v. Hollins*, 3 *Duer*, 686; *Livermore v. Jenks*, 11 *How. Pr.*, 479.

The reported cases in this State in which it does not distinctly appear that the bond was submitted to the court, are *People v. Murray*, 5 *Park. Cr.*, 577; *Stevens v. Phoenix Ins. Co.*, 24 *How. Pr.*, 517;

Fisk *v.* Union Pacific R. R. Co.

Livingston *v.* Gibbons, 4 *Johns. Ch.*, 94; Rogers *v.* Rogers, 1 *Paige*, 183; Leonard *v.* Jamison, 2 *Edw.*, 136; North River Comp. *v.* Hoffman, 5 *Johns. Ch.*, 300; Dennistoun *v.* N. Y. & New Haven R. R. Co., 1 *Hilt.*, 62; People *v.* N. Y. C. P., 2 *Den.*, 197; Redmond *v.* Russell, 12 *Johns.*, 153; Corp *v.* Vermilye, 3 *Id.*, 145; Benjamin *v.* Murray, 28 *How. Pr.*, 193.

And in all these cases *the application was denied on other grounds.*

In the following cases a petition for a removal was granted, although it does not distinctly appear from the report that a bond was filed or submitted to the court at the time of the application:

Arjo *v.* Monteiro, 1 *Cai.*, 248; Jackson *v.* Stiles, 4 *Johns.*, 493; Byam *v.* Stevens, 4 *Edw.*, 119; Illius *v.* N. Y. & N. Haven R. R. Co., 13 *N. Y.* [3 *Kern.*], 597; Disbrow *v.* Driggs, 8 *Abb. Pr.*, 305, note; Liddle *v.* Thatcher, 4 *Edw.*, 294; Bird *v.* Murray, *Col. & C. Cas.* But in none of these is there anything to sanction a removal without giving approved security.

The following cases are to the effect that the petitioner must procure his sureties, to be approved by the court:

The court must be satisfied as to the sufficiency of the security, as a prerequisite to the removal. Cooley *v.* Lawrence, 5 *Duer*, 605, 609.

Although an order of removal may not perhaps be necessary to give effect to the removal, yet the petitioner must give satisfactory security, and it is necessary that the court make an order approving of the security, in order to perfect the removal. Vandervoort *v.* Palmer, 4 *Duer*, 677.

As a rule of practice, the court should not approve any sureties, unless the amount of the bond is equal to the sum in which the defendant in action has been held to bail, if bail has been required in the State court. This fact should be made to appear to the satisfaction of the judge to whom the bond is presented for approval. Per LEONARD, J., in Jones *v.* Seward, 17 *Abb. Pr.*, 391; S. C., 41 *Barb.*, 269; 26 *How. Pr.*, 433; reversing 40 *Barb.*, 563, and 26 *How. Pr.*, 33.

The court, after ordering a removal, may rescind the order on the ground that the sureties which it had approved are insufficient. An appellate court will not, except in a very strong case, interfere with the discretion of the court below on the question of security. Fitz's Syndic *v.* Hayden, 4 *Mart. N. S.*, 658.

The following are the earlier cases above referred to, in which the production of a bond was not deemed essential in the first instance:

It is not essential that the *petition* contain an offer of security. Surety need not be given or offered until it has been judicially determined that, upon the facts, defendant is entitled to a removal. Giving

Fisk *v.* Union Pacific R. R. Co.

security is in its nature an act subsequent to the decision on the petition. *Campbell v. Wallen, Martin & Y.*, 266.

Where the defendant produces and tenders in court on the hearing of the petition sufficient sureties, it is not necessary that he himself be present to execute the bond. The law does not require the execution of a bond. A stipulation in the nature of a recognizance taken in court would be sufficient. *Brown v. Crippin*, 4 *Hen. & Mun.*, 173.

It appeared in *Hodgson v. Millward*, 3 *Grant's Cas.*, 412, that the surety was offered at the same time as the petition, and the court referred it to the prothonotary to approve the surety.

Where the petition, which was filed on the day that defendant pleaded to the writ, and before the motion for a removal was made, contained an offer to give two sufficient sureties, designating them by name,—*Held*, that this was a sufficient offer. *Hill v. Henderson*, 6 *Smedes & M.*, 351.

Waiver of the right of removal. When a submission to the authority of the State court has once been made, instead of duly fulfilling the statutory conditions of the right of removal, it cannot be retracted. *Cooley v. Lawrence*, 5 *Duer*, 605.

When the State court erroneously refuse to allow a removal, the defendant, even after he has litigated the cause on the merits in the State court, and judgment has gone against him, may have the judgment reversed on error in the supreme court of the United States, and a removal of the cause directed *nunc pro tunc*; for proceedings after an erroneous refusal of removal are *coram non judice*. *Gordon v. Longuest*, 16 *Pet.*, 97. *S. P., Kanouse v. Martin*, 14 *How. U. S.*, 23.

A State court cannot refuse to permit an alien defendant to remove his cause into the United States circuit court, if the requisites of the act of Congress have been complied with. After such refusal all subsequent proceedings in the State court are *coram non judice*. *7th Circ. (Mich.)*, 1853, *Matthews v. Lyall*, 6 *McLean*, 13. *S. P., Circ. of Cal.*, 1856, *Brownell v. Gordon*, 1 *McAll.*, 207.

After application has been refused, defendant does not waive his right by answering and proceeding to trial. There can be no waiver of objection to proceedings that are entirely erroneous and void for want of jurisdiction. *Herryford v. Aetna Ins. Co.*, 42 *Mo.*, 148.

Although a party cannot by consent give a court jurisdiction when it had none by law, yet when the court has jurisdiction of the subject-matter and the person, and the defendant has some privilege which exempts him from the jurisdiction, he may waive it, if he chooses to do so. *Bostwick v. Perkins*, 4 *Geo.*, 47; *Overstreet v. Brown*, 4 *McCord*, 82; *Robinson v. Potter*, 43 *N. H.*, 188.

Where the State court has unquestioned jurisdiction both of the

Fisk *v.* Union Pacific R. R. Co.

parties and the subject-matter of the controversy, prior to and at the time when the defendants move the court that it may be certified to the proper Federal court, an error of judgment in overruling this motion does not oust the jurisdiction of the court. Full jurisdiction, having once attached, must be held to continue until the case is disposed of, either by certificate, or final judgment or decree, however erroneously it may have been exercised. *Hadley v. Dunlap*, 10 *Ohio St.*, 1.

Where a foreign corporation sued in a State court, appeared there and removed the suit to the circuit court, under section 12 of the judiciary act,—*Held*, that it was too late to object to the jurisdiction of the State court, or to take any exception to the process by which the corporation was brought in. *1st Circ. (R. I.)*, 1854, *Sayles v. Northwestern Ins. Co.*, 2 *Curt. C. Ct.*, 212.

Nor is it ground to dismiss for want of jurisdiction in the circuit court, in such case, that the defendant is not an inhabitant of, and could not be found in the district. Proceeding for a removal of the cause to the circuit court is a waiver of the privilege to be sued in another district. *Ib.*

The order of removal. There has been considerable diversity of opinion as to the extent of the discretion of the State courts in reference to these applications, and the strictness with which they are to construe the provisions of the statute. It may be regarded as settled that in general an application for the removal of a cause from a State to a Federal court, in a case within the provisions of the act of Congress, is a matter of right; and is not addressed to the mere discretion of the State court. *U. S. Supreme Ct.*, 1842, *Gordon v. Longuest*, 16 *Pet.*, 97.

Whether Congress has or has not power to impose duties on State courts, it has power to authorize the United States courts to take jurisdiction when the State courts certify that the case is proper to be removed; and it is clearly the duty of the State courts to relinquish jurisdiction in a case within the statute. 1857, *Shelby v. Hoffman*, 7 *Ohio St.*, 450.

The State courts have, however, in many cases, held a somewhat different language. The following authorities will illustrate the course of opinion upon the subject:

Under the act of Congress of 1789,—which provides for the removal of causes between citizens of different States from a State court into a United States court,—it devolves upon the State court to exercise a discretion in the interpretation of the statute, and its application to the case in question. The State court must be satisfied as to the sufficiency of the surety, and that the sum or value in dispute exceeds five

Fisk *v.* Union Pacific R. R. Co.

hundred dollars, a question regulated by the amount claimed in the action. [16 Pet., 104.] And that court is to judge whether the petition has been filed at the time of entering the appearance in that court. *N. Y. Superior Ct.*, 1855, *Cooley v. Lawrence*, 5 *Duer*, 605.

The State court is to exercise a discretion in determining whether the case is within the statute, and to deny a removal in doubtful cases. *Anderson v. Manufacturers' Bank*, 14 *Abb. Pr.*, 436.

If the defendant makes out a case within the statute, the court has no discretion to withhold the right of removal. *Gordon v. Longuest*, 16 *Pet.*, 97.

Upon a petition for the removal of a cause from a State court to a court of the United States, the former has no discretion to refuse *one entitled* to the jurisdiction involved, to remove his cause thither, but a judicial discretion merely to decide and declare whether the petitioner is thus entitled. *James v. Thurston*, 6 *R. I.*, 428.

Under the act of Congress of 1789, and the statute of California of 1855, respecting the removal of causes from the State to the United States courts, the court must first be fully satisfied by proper evidence that the application for removal is founded upon facts which entitle the applicant to the order, and for this purpose has the right to inquire into the truth of the facts set forth in the petition, as well as to investigate the sufficiency of the security. *Orosco v. Gagliardo*, 22 *Cal.*, 83.

Where the right of the defendant to remove a case into the United States circuit court is extremely doubtful, the State court should not exercise its power. *N. Y. Supreme Ct.*, 1862, *Anderson v. Manufacturers' Bank*, 14 *Abb. Pr.*, 436.

Thus, where the action was by an assignee of the cause of action, suing in his own name, as required by the practice in the State court, and the assignor, whose name must, if the cause were transferred to the United States court, be substituted as plaintiff, was a citizen of the same State as the defendant,—*Held*, that the motion to remove should be denied. *Ib.*

It is erroneous to order a removal without some proof of the facts giving the right. *Prima facie* evidence should at least be offered before the court surrenders its jurisdiction. *State Bank v. Morgan*, 4 *Mart. N. S.*, 344.

These are not cases in which the comity of the court is to be exercised. If the defendant is not strictly entitled to have his cause removed, the State court must maintain its jurisdiction, for plaintiff has as strong a claim to have it retained as the defendant has to have it removed. *Redmond v. Russell*, 12 *Johns.*, 153.

In cases of concurrent authority, the tribunal which first obtains

Fisk *v.* Union Pacific R. R. Co.

jurisdiction, and is competent to administer it, will retain it, and another will not interfere. The act of Congress confers a privilege innovating upon this rule, and prescribing how and when this privilege may be exercised. The statute must be, in its fair construction, pursued, or the acknowledged jurisdiction of the first tribunal must be sustained. *Howard v. Taylor*, 5 *Duer*, 604; S. C., 11 *How. Pr.*, 380.

The courts of the United States are courts of limited jurisdiction; and statutes relative to their jurisdiction, and for the transfer of the jurisdiction of causes from a State court, must be strictly construed. *Bryan v. Pouder*, 23 *Georgia*, 480.

Section 12 of the judiciary act of 1789,—which makes provision for the transfer of a cause from the State court in which it originated, into “the next circuit court” (of the United States) “to be held in the district where the suit is pending,”—does not authorize the transfer of such cause into the Federal *district* court, although that court exercises some of the powers of a circuit court. Therefore, where the application asked for the removal of a cause into “the next circuit court of the United States to be held for the district where said suit is pending, to wit, the middle district of the State of Alabama,” and was accompanied by an offer of good security for the defendant’s personal appearance “in the circuit court of the United States to be held for the middle district of the State of Alabama,” the application was properly refused. *Exp. Groom*, 40 *Ala.*, 731.

A cause removed into the circuit court upon a petition for an order of removal from a State court to the circuit or district court of the United States, will not be dismissed on the ground of the uncertainty in the designation of the court. As the district court has no jurisdiction, such an alternative order can cause no surprise. 7th *Circ. (Ind.)*, 1848, *McVaughter v. Cassilly*, 4 *McLean*, 351.

If there are two circuits of the United States court within the State, the supreme court of the State may remove the cause to either circuit; and where the defendant was arrested in the district which was nearest to the place where the cause of action arose, they sent it there. *N. Y. Supreme Ct.*, 1845, *Suydam v. Smith*, 1 *Den.*, 263.

Where there was no sufficient proof that convenience required it, the court refused to send the cause to the other district. *Norton v. Hayes*, 4 *Den.*, 245.

Authentication of petition. It is no objection to an application to remove a cause from a State court into the circuit court of the United States, that the petition is signed by an attorney of the court, and not by the petitioner himself, nor that the bond is not signed by him, but

Fisk *v.* Union Pacific R. R. Co.

is signed by sureties only. *N. Y. Superior Ct.*, 1855, *Vandevoort v. Palmer*, 4 *Duer*, 677. (But see a contrary case, below.)

When the action is against parties, and is commenced by service on one only, if all the defendants are citizens of another State, and the plaintiff is a citizen of this State, it is not necessary that any defendant should petition except the one served, nor that the bond should be conditioned for the appearance of any defendant except the petitioner. *Ib.*

A petition verified by an agent,—*Held*, sufficient. *Ib.*

A petition signed by attorney is not enough. It must be signed by the defendant. *Kirkpatrick v. Hopkins*, 2 *Miles*, 277.

Effect on the proceedings in the cause. After the right of removal from a State to a circuit court is complete, any proceeding of the State court in the cause is erroneous; and if proceedings are had without a plea to the jurisdiction, a court of error should examine the proceedings for removal, and reverse the judgment. *U. S. Supreme Ct.*, 1853, *Kanouse v. Martin*, 15 *How. U. S.*, 198.

When the proper papers are presented the cause is necessarily removed, and the State court cannot afterwards, by merely vacating their order allowing the removal, regain jurisdiction of the cause. Any proceedings in the State court, after the presentation of the petition and the taking of the other steps requisite to a removal of the case, would be *coram non judice*, and a nullity. *Supreme Ct. Sp. T.*, 1855, *Livermore v. Jenks*, 11 *How. Pr.*, 479.

If the case on which a State court has granted a removal is not within the statute, it may reconsider the application, rescind the order, and proceed with the cause. 1824, *Shepherd v. Young*, 1 *Monr.*, 203.

The fact that plaintiff has obtained an injunction on a motion noticed since the notice of motion for removal, does not affect the defendant's right to a removal. *Byam v. Stevens*, 4 *Edw.*, 119.

If an injunction is pending in the State court, and after removal the State court will not enforce it, the circuit court will interfere with a new injunction.

It seems, that the statute should be so construed as to prevent the defendants from eluding the State court injunction. *U. S. Circ. Ct. (Mass.)*, 1860, *Bowen v. Kendall*, 13 *Law Rep. N. S.*, 538.

If there is an outstanding injunction, although it could not be enforced by the State court after a removal of the cause, by complying fully with the statute, the order of removal may provide that the injunction shall continue in force until dissolved by one court or the other. *Liddle v. Thatcher*, 12 *How. Pr.*, 295.

A default entered in a cause against a party in a State court, while his application for a removal of the cause into a court of the United

Fisk *v.* Union Pacific R. R. Co.

States, under the judiciary act of 1789, is pending, is irregular, and under such circumstances should be set aside on motion. *Mattoon v. Hinckley*, 33 Ill., 208.

In this case, although the application for the removal of the cause was still pending in the State court, the case was left off the docket for two years, and the plaintiff, in the mean time, treated the case as having been actually removed, by making an affidavit setting up the pendency of the suit in the United States court, and giving a notice based thereon to the defendant, to take depositions in the case, then "pending and undetermined in the circuit court of the United States," &c. After this the plaintiff took default in the State court. The previous action of the plaintiff, in treating the cause as having been removed, was also deemed sufficient reason for setting aside the default.

The remedy for a refusal to allow a removal is by error or appeal. A mandamus cannot be issued. *Shelby v. Hoffman*, 7 Ohio St., 450.

After the defendant has made out a case for a removal, it is error for the court to proceed further. A mandamus is not the proper remedy, but defendant, after litigating the cause unsuccessfully upon the merits, may have the order reversed on appeal. *Hill v. Henderson; 6 Smedes & M.*, 351.

To the same effect, *Campbell v. Wallen, Martin & Y.*, 266.

In the supreme court of Indiana, an appeal does not lie from an order transferring a cause from a State to a Federal court. *City of Aurora v. West*, 25 Ind., 148.

After a defendant has filed his petition for a removal of the cause from a State to a circuit court, he cannot be called upon to plead to the jurisdiction of the State court. *U. S. Supreme Ct.*, 1853, *Kanouse v. Martin*, 15 How. U. S., 198.

On the transmission of the process or declaration by which a suit was commenced in a State court, and the entry of the same in a circuit court, the plaintiff must file a new declaration according to the practice of the circuit court, as if the suit were an original one in that court. Until he has done so, he cannot enter a rule to plead, or a default for not pleading. *2nd Circ. (N. Y.)*, 1846, *Martin v. Kanouse, 1 Blatchf.*, 149.

Where an attachment made in a State court would, by the law of such State, hold the property as against a foreign assignment for the benefit of creditors, the same effect will be given to it by the circuit court, to which the action has been removed under section 12 of the judiciary act. *1st Circ. (Mass.)*, 1856, *Clarke v. Chase*, 11 Law Rep. N. S., 394.

If the special bail given in conformity to section 12 of the ju-

Fisk *v.* Union Pacific R. R. Co.

dictary act, upon removal of a cause from a State court to the circuit court of the United States, desire to surrender his principal, it should be done in open court, and not by a commitment according to the local law of the State. If the party, however, is so committed, a writ of *habeas corpus* will be granted by the circuit court, upon petition of the bail, to bring the party into court, to be surrendered in discharge of his bail. *1st Circ. (R. I.)*, 1841, *Holbrook v. Seagraves*, 4 *Law Rep.*, 143.

Where an action is removed from a State court to the circuit court, under section 12 of the judiciary act, certified copies of the process or papers by which the suit was commenced in the State court and of an order of that court for their transmission, should be sent to and entered in the circuit court. Where a defendant, instead of adopting that course, entered what purported to be a copy of a declaration in the action in the State court, but the copy was not certified from the State court or accompanied by a certified copy or any order of the State court for its transmission, and then entered a rule to declare,—*Held*, that the rule to declare must be vacated, and the copy declaration be taken from the files. *2nd Circ. (N. Y.)*, 1846, *Martin v. Kanouse*, 1 *Blatchf.*, 149.

A cause removed from a State court to the circuit court, under section 12 of the judiciary act, stands as though originally commenced in the circuit court. *7th Circ. (Mich.)*, 1852, *McLeod v. Duncan*, 5 *McLean*, 342.

It stands, in the circuit court, as it did in the former, at the time of the removal. *7th Circ. (Ill.)*, 1847, *Gier v. Gregg*, 4 *McLean*, 202.

Staying Proceedings. Where actions of ejectment, after judgment against the casual ejector, are removed from the supreme court of this State, into the United circuit court, the former will stay further proceedings on such judgment. *N. Y. Supreme Ct.*, 1809, *Jackson v. Stiles*, 4 *Johns.*, 493.

Second Application. After plaintiff has filed a supplemental pleading, the defendant cannot again claim the right to a removal on appearing to answer such supplemental pleading; nor does it make any difference that his citizenship was acquired after commencement of the suit. *Richardson v. Packwood*, 1 *Murt. N. S.*, 299.

After a cause removed to a court of the United States under the act of 1789, upon a defective petition, has been remanded by that court on account of the defect,—the State court should not allow a second application. The application must be made at the time of appearance. 1829, *Eastin v. Rucker*, 1 *J. J. Marsh.*, 232.

It is questionable whether after having filed a defective petition and the same has been denied, the defendant can be allowed to file

Fisk *v.* Union Pacific R. R. Co.

an amended petition, and renew the application. But if this can be allowed the amended petition should be denied if it does not allege a case clearly within the statute. *Savings Bank of Cincinnati v. Benton*, 2 *Met. (Ky.)*, 240.

Under the act of 1866, (14 *U. S. Stat. at L.*, 306), as well as under the judiciary act, a removal of a suit brought by several plaintiffs, cannot be ordered on the ground that "the suit is commenced by a citizen of the State in which the suit is brought," &c., unless all the *plaintiffs* are citizens of that State; yet where the plaintiffs are all citizens of the State in which the action is brought, and there are associated with a defendant, who is a citizen of the same State, persons who are citizens of a different State, any such citizen of another State may, in the cases provided for, have a removal. *N. Y. Supreme Ct. Sp. T.*, 1868, *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 3 *Abb. Pr. N. S.*, 453; *S. C.*, 53 *Barb.*, 472.

The provision of the act of Congress of July 27, 1866 (14 *U. S. Stat. at L.*),—allowing a removal, if the suit be brought for the purpose of restraining or enjoining a person not a citizen, or, if there can be a final disposition of the controversy, &c.,—the word "or" is disjunctive, and is so used as to show that Congress was providing for two different classes of cases; 1st, where the suit was to obtain an injunction; and, 2d, where the presence of the other defendants was necessary to the determination of the controversy as respects the defendant seeking the change of forum. *Ib.*

The act of Congress of March 2, 1867 (14 *U. S. Stat. at L.*, 558), is not inconsistent with that of 1866, and has no repealing words, and may be regarded merely as an addition thereto. But it only applies to a suit brought by a citizen of the State in the court of which the action is commenced, against a citizen of another State. *Ib.*

An application for removal of a cause from a State court into the Federal court, under the law of 1867 (14 *U. S. Stat. at L.*, 558), upon the ground that from prejudice or local interest, justice cannot be obtained in the State court, should not be granted, when made by one of several defendants. *N. Y. Supreme Ct.*, 1869, *Cooke v. State National Bank of Boston*, 1 *Lans.*, 494.

Test of the amount involved. To justify a removal of a suit from a State to a circuit court under section 12 of the judiciary act, the matter in dispute must exceed five hundred dollars. This fact may appear by the *ad damnum* in the writ when the declaration discloses no precise sum, or by the declaration in preference to the writ, if a sum certain is there claimed. And if any doubt exists as to what is the real amount in dispute, the State court may inquire into it by evidence. If the State court become satisfied that the plaintiff intends

Fisk v. Union Pacific R. R. Co.

to recover no more than five hundred dollars, it is justified in not allowing the action to be removed. It must not, however, by a release of damages, amendments or otherwise, permit the right to remove the action to be taken away, where at the time of the application the plaintiff clearly appears to have sought to recover more than five hundred dollars. *1st Circ. (Mass.)*, 1847, *Ladd v. Tudor*, 3 *Woodb. & M.*, 325.

The defendant cannot be deprived of the right to a removal of the cause, by an amendment reducing the amount claimed below five hundred dollars, allowed in the State court after the avowal has become complete. *Supreme Ct.*, 1853, *Kanouse v. Martin*, 15 *How.*, 198. And see *Wright v. Wells, Pet. C. Ct.*, 220.

In assumpsit, the damages laid in the declaration are presumptively the amount in dispute, and should regulate the action of the State court on a motion to remove the cause. But the presumption is not conclusive, and plaintiff may prevent a removal by amending his declaration so as to reduce the claim to less than that sum. *N. Y. Supreme Ct.*, 1846, *People v. New York C. P.*, 2 *Den.*, 197; Compare *Disbrow v. Driggs*, 8 *Abb. Pr.*, 305, note; *Kanouse v. Martin*, 15 *How. Pr.*, 198. An action to set aside an issue of corporate stock to a large amount, and to enjoin any future transfers or sales thereof, is a case where the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs. *N. Y. Supreme Ct. Sp. T.*, 1868, *Fisk v. Chicago, Rock Island & Pacific R. R. Co.*, 3 *Abb. Pr. N. S.*, 453; *S. C.*, 53 *Barb.*, 472.

Where, on the record in the State court, it must be held that the matter in dispute exceeded, when the suit was commenced, the sum of five hundred dollars, exclusive of costs, the jurisdiction of the United States court having once attached, no subsequent court can divest it [12 *Pet.*, 164], and the reduction, therefore, of the amount of the claim by the declaration filed in the United States court, does not entitle the plaintiff to have the cause remanded to the State court. *U. S. Circ. Ct. S. Dist. of N. Y.*, 1870, *Roberts v. Nelson*, 40 *How. Pr.*, 387.

Plaintiff cannot, by declaring in the circuit court on several claims, one of which is not within the jurisdiction of the court, entitle himself to have the cause remanded, even if on striking out such claim the remaining amount involved is less than five hundred dollars. *Ib.*

Exception as to choses in action. An action brought by an assignee of a claim for damages for the breach of a contract of a common carrier to carry goods, is an action by an assignee of a promissory note or chose in action, within the meaning of the United States judiciary act of September 24, 1789, and cannot be removed into the circuit court of the United States. A chose in action, or a thing in

Congregation Beth Elohim *v.* Central Presbyterian Church.

action, is a term used in contradistinction to a chose or thing in possession, and is applicable to cases where the title to money or property is in one person, and the possession is in another, which by contract he is bound to deliver to the owner. [8 N. Y., 430; 14 Abb. Pr., 436.] *N. Y. Supreme Ct.*, 1866, *Ayers v. Western R. R. Corp.*, 48 *Barb.*, 132; S. C., 33 *How. Pr.*, 351.

An action to recover damages, for failing properly to present and protest a promissory note, is an action brought to recover on a chose in action, within the meaning of the act of September 24, 1789. *N. Y. Supreme Ct.*, 1862, *Anderson v. Manufacturer's Bank*, 14 *Abb. Pr.*, 436.

For matters peculiar to the act of 1833 and 1863, relative to suits against officers, consult, as to act of 1833: *Salem & Lowell R. R. Co. v. Boston & Lowell R. R. Co.*, 11 *Law Rep. N. S.*, 210; *Coggill v. Lawrence*, 2 *Blatchf.*, 304; *Wood v. Matthews*, 2 *Blatchf.*, 370; S. C., 23 *Vt.*, 735; *Van Zandt v. Maxwell*, 2 *Blatchf.*, 421; *Commonwealth v. Casey*, 12 *Allen*, 94. As to act of 1863: *Hodgson v. Millward*, 3 *Grant's Cases*, 418; *Commonwealth v. Artman*, 3 *Id.*, 436; *Jones v. Seward*, 17 *Abb. Pr.*, 377; S. C., less fully, 41 *Barb.*, 269; *Siebrecht v. Butler*, 2 *Abb. Pr. N. S.*, 361, note; *McCormick v. Humphrey*, 27 *Ind.*, 144; *Eifort v. Bevins*, 1 *Bush. (Ky.)*, 460.

THE CONGREGATION BETH ELOHIM *against* THE CENTRAL PRESBYTERIAN CHURCH.

City Court of Brooklyn; Special Term, June, 1871.

CONVEYANCES BY RELIGIOUS CORPORATIONS.

Corporations may contract for the sale of real estate without the common seal; and the use of the individual seals of the corporate officers does not vitiate the contract.

The distinction between the powers of a religious corporation and other corporations, as to alienating lands, is that the former must obtain the consent of the court.

The object of the statute is to protect the corporators from the personal loss of the property.¹

Congregation Beth Elohim *v.* Central Presbyterian Church.

The granting of the land is the act to which the statutory restraint is directed.

The statute does not prohibit a religious corporation from making, without such consent, an executory contract of sale preliminary to conveyance; and it is sufficient if the consent be obtained after the contract, and before the time of conveying the property.

The contract need not expressly provide that such consent shall be obtained. Such a condition may be implied, and, there having been no breach of trust, nor intent to evade the statute, the contract is not *ultra vires*.

The trustees of a religious corporation, in carrying out a contract for the sale and conveyance of its property, have incidental power to agree to an extension of the time for delivery of the deed.

Objections which might be obviated,—such as that the order of court allowing a sale had not been filed,—if relied on to sustain a refusal of a tender of the deed, must be specified at the time of the refusal.

On an executory contract for the sale of real property, the seller can not recover of the purchaser in default the contract price, except in an action for specific performance. If he rescinds or brings his action on the contract, he can recover such damages only as shall compensate him for the loss of the bargain.*

Trial by the court.

This action was brought by the trustees of the Congregation Beth Elohim against the Central Presbyterian Church of the city of Brooklyn, to have a contract declared void, and to reclaim four thousand dollars of the consideration paid on it.

The complaint set forth a contract, dated February 9, 1870, executed by the parties, wherein the defendants agreed to sell, and plaintiffs to purchase the defendants' church property for fifty-five thousand dollars, payable as follows: four thousand dollars down, twenty thousand dollars, by assuming a mortgage then

* As to the rule of damages against a *vendor* in default, compare *Pumpelly v. Phelps*, 40 *N. Y.*, 59; reversing *Brinckerhoff v. Phelps*, 24 *Barb.*, 100; *Mack v. Patchin*, 42 *N. Y.*, 167; *Watkins v. Rush*, 2 *Lans.*, 234.

Congregation Beth Elohim *v.* Central Presbyterian Church.

on the property, fifteen thousand dollars by a mortgage to be given, and sixteen thousand dollars in cash on July 5, 1870, when the deed was to be delivered ; that the trustees signing the contract affixed their private seals ; that at that time no order of the court consenting to the sale had been obtained, of which plaintiffs were then ignorant ; and that a return of the four thousand dollars had been demanded, but refused.

The answer, admitting the material allegations in the complaint, set up that the order of consent was obtained prior to the time for the delivery of the deed ; that the time for the delivery of the deed had been extended to July 12, 1870 ; that a tender of the deed and demand of payment were then made, and that plaintiff made default, and, as a counter-claim, demanded judgment for the fifty-one thousand dollars, residue of the consideration unpaid.

The reply set up special matters, and denied that the trustees, extending the time to July 12, had authority to do so, and alleged that the defendants had not a good title to the property.

It appeared that the petition for the consent of the court to the sale was presented to the supreme court on June 23, 1870, signed and verified by the defendants' trustees, with the common seal, the contract being set out, and the use in their church improvement to which the proceeds were to be applied, stated ; that the order was granted by the supreme court, and signed by the presiding justice ; that the petition and order were delivered to plaintiff's counsel, then engaged in examining the title, and, on January 13, 1871, were filed and entered in the county clerk's office.

Josiah T. Marean, for plaintiffs.

Daniel P. Barnard and Thomas E. Pearsall, for defendants.

Congregation Beth Elohim *v.* Central Presbyterian Church.

NEILSON, J.—The contract in question was in proper form, and was duly executed, unless the circumstance that the trustees, by whom it was subscribed, affixed their private seals, instead of the common seals of the parties, be an objection.

The common seal, affixed to the written undertaking of a corporation, gives an assurance of authority, and of a consideration. But the presumptions arising from the presence of the seal may, in its absence, arise from the proofs. We have reduced the metaphysical conception, that a corporation could only speak or declare its will by the common seal, to a mere question of evidence, and have assimilated the freedom of expression to be imputed to a body corporate, through its agents, to that possessed by a natural person. As to both, we apply the rule that a seal unnecessarily used by an agent may be disregarded (19 *Johns.*, 60; 4 *Wend.*, 285; 5 *Id.*, 572; 30 *Barb.*, 218; 8 *N. Y.* [4 *Seld.*], 160; 19 *N. Y.*, 305; 1 *Harr. & Gill*, 413; 7 *Cranch*, 299; 8 *Wheat.*, 338).

The informal manner in which corporations, proceeding in their legitimate operations, may become bound, as natural persons may become bound, has been largely illustrated in cases where the courts have resorted to presumptions, or to the principles peculiar to the election, assent, adoption and ratification by parties of their transactions. Many of the implied engagements of corporations, not otherwise obligatory, have been thus defined and enforced (15 *Barb.*, 323; 17 *N. Y.*, 449; 19 *Id.*, 207; 5 *Hill*, 137; *Hill & Denio's Supp.*, 398).

As a corporation can only contract in respect to and manage its business and property by agents, whether the common seal be used or not; as it can declare its will through those agents with more clearness and certainty than by the use of any sign or symbol, however significant by reason of the fiction imputed to it, there

Congregation Beth Elohim *v.* Central Presbyterian Church.

are few occasions when the common seal need be used. By applying to a corporation the rules of law which govern principal and agent, in their dealings with third persons; by holding them to the natural laws which are known to influence human conduct, and by rejecting theoretical distinctions between artificial and natural persons, the gradual course of judicial development has given us a clear and intelligible system. As a general rule, a corporation, within its appropriate sphere, may contract when and as the citizen might contract, in reference to the same matters.

It follows from these general views that the agreement in question in this action was well executed without the common seal; and that, as no seal whatever was required to a mere contract for the purchase and sale of real estate, the private seals used do not affect the instrument.

Moreover, it is well understood that a corporation may adopt, for the time or occasion, any seal.

The defendants' acceptance of the four thousand dollars paid by the plaintiffs, was an adoption of the contract.

It is claimed that this contract was *ultra vires*, as, in unconditional terms, it was for the sale of real estate by a religious corporation, the consent of the court not having been previously obtained.

A religious corporation has the title to its real property, may determine when it should be sold, and has the sole and exclusive power to enter into contracts for that purpose. The only distinction which exists between its power of alienation and that possessed by other corporations, is, that the consent of the court is necessary.

It is true that the statute in terms requires that consent "for the sale," but, it is equally true that the statute does not, in terms, or by necessary implication, restrain the making of a contract as a preliminary step

Congregation Beth Elohim *v.* Central Presbyterian Church.

towards such sale. Such an enactment, like other restrictions impairing what otherwise would be a common law right, is to be construed and applied with strict regard to the intention of the legislature. In this instance the intent was to protect the members of the church or society—the corporators, the real parties in interest—from the perversion of the property. The granting of the land was the act to which this restriction was directed. Hence it has been held that the application might be for a consent to a conveyance, and that an order, in that form, was proper. The liberal sense in which the phrase “for the sale” may be thus taken, is consistent with the statute, and with accepted rules of interpretation. It is quite apparent, therefore, that full effect is given to the intent of the legislature, and to the claims of the corporators if, at any time before the actual conveyance is given, the supervision of the court is invoked and the consent obtained (*7 Paige*, 77; *6 Bosw.*, 245; *1 Abb. Pr. N. S.*, 214).

It is claimed, however, that the contract, if not preceded by the consent of the court to the sale, should contain a promise or condition as to its being granted.* Such an undertaking was expressed in the contract approved in *Bowen v. Irish Presbyterian Congregation of New York* (*6 Bosw.*, 545). That mode of contracting is prudential. But these parties, with knowledge that that consent was necessary, entered into this agreement, contemplating that, in due time, the proper order would be granted. The purpose of both parties

* *Cowdrey v. Carpenter* (*1 Robt.*, 429), in which it was held, that an agreement to pay a sum as liquidated damages in case a court, in which an action was then pending, should fail to make an order containing a specified provision affecting substantial interests, was void, was reversed in the court of appeals, on the ground that such an agreement was neither contrary to public policy nor void as being in the nature of a wager.

Congregation Beth Elohim v. Central Presbyterian Church.

being just and reasonable, beyond criticism, and approved by their corporators, there was no reason to apprehend that the court would hesitate to grant that consent. It became the duty of the defendants to make the application before the day fixed for the delivery of the deed. That duty would not have been more imperative had it been expressed in writing. If the defendants had neglected that duty, and if the plaintiffs had come forward prepared to make the payment, and to accept the deed, a specific performance could have been compelled. In view of the meritorious character of the arrangement, a court of equity would have made a summary disposition of that question, and could have supplied the omission, or regarded that as done which should have been done.

This contract contained all the necessary provisions ; the description of the property, the price, time for the payment and conveyance, fully, and in detail.

What remained, however, taking the objection in terms, related to the defendant's ability to carry out the proposed sale. It is claimed that the agreement should have treated of that also. I am not aware of any adjudication, or principle, applicable in support of that view. There have been several cases in the courts in England where railway companies, under express restraints as to the extent of their lines or the purchase of land, have undertaken to contract upon the express condition that an act of Parliament could be obtained, authorizing the scheme. In such cases, there being want of power, want of interest in the subject matter of the contract, and the action of Parliament being uncertain, there was special occasion for making the agreement conditional.

It is apparent that such cases have no application to that under consideration. The answer to the objection urged is that when a party who has the title to the property to be conveyed, and has common law

Congregation Beth Elohim v. Central Presbyterian Church.

rights in respect to its sale, enters into an agreement not contrary to public policy, his ability to carry out the undertaking, or the special acts to be performed by him in perfecting that ability by procuring some consent or license, need not be specified in the agreement. He is to give a good and sufficient deed of conveyance, and, as an incident, is bound to do whatever is necessary to that end. A known and well defined duty, under the contract and this statute, devolved upon the defendants. As its observance was possible, was necessary to enable them to carry out their engagement, they were bound to that observance, although the contract was silent on the subject.

No right or interest was affected by that silence. Who would suffer? Not the plaintiffs, as a court of equity could give protection: not the defendants, as they may be assumed to have promised to obtain that consent: not the corporators, as they were not deprived of protection; not the spirit of the statute, as there was no attempt at an evasion. Whether expressly recognized in the contract or not, the necessity of the consent of the court would be present and be recognized when the time came for executing and delivering the deed.

It follows that, to save a meritorious agreement, the defendants' undertaking to obtain the proper order in respect to the conveyance, would be implied. That would not be extending or modifying the contract—would not lessen the rights of the one party or increase the obligation of the other. It would be imputing the proper motive, assuming that they intended to respect the statute. The principle I am suggesting was had in mind by MAULE, J., when he said to counsel (83 *Eng. Com. Law*, 626), "Can you state as a proposition of law, that there cannot be a legal transfer? . . . And, if there may, must it not be understood that the parties contemplate a transfer by legal means?"

Congregation Beth Elohim *v.* Central Presbyterian Church.

So also, by ERLE, J., in *Mayor, &c. v. Norfolk Railway Co.* (30 *Eng. L. & Eq.*, p. 127 of op.), when he said, as he might if speaking to this case, "The rule of construction above mentioned has been frequently recognized. I cite two cases in which it was applied under analogous circumstances—*Sewell v. Royal Exchange Assurance Company*, 4 *Taunt.*, 456, and *Haines v. Bush*, 5 *Id.*, 521,—where the contracts were for voyages that were prohibited and unlawful, but might have been made lawful if licenses were obtained: the contracts did not stipulate that licenses should be obtained, but the court held that the contracts must be construed to mean voyages with licenses, as that construction would make them valid."

So also, by POLLOCK, C. B. (8 *Exch.*, 922), noticing the time of performance to be imputed, "There is another maxim of law, viz: that every reasonable condition is also implied."

There is no substantial difference between the contract approved in the case in the sixth of *Bosworth*, and that now in question. The same principle governs both, and, if the consent of the court to the conveyances had been withheld, both contracts would have been inoperative. But, such consent having been given, the contingency was removed. Such contingency was very slight, however, as compared with that which existed in the cases adverted to, where an act of Parliament was necessary to enable railway companies to contract:—the action of Parliament being uncertain, the action of the court certain. No number of wise men could tell what Parliament might do; any discreet lawyer could, upon this contract and petition, have said what the court would do. What would have been the creation of power,—the granting of a privilege—in those cases, would merely have been consenting to the exercise of a clear right in this case. This was a valid contract, liable, like many others, to be defeated, but the

Congregation Beth Elohim *v.* Central Presbyterian Church.

question as to its force or effect, independently of the order of consent obtained, is of secondary importance. The proposition settled in *Eastern Co. R. R. Co. v. Hawkes* (35 *Eng. L. & Eq.*, 8), would, if need be, apply. "The mere want of legal power to make the contract at the moment of entering into it, will not affect its validity afterwards."

The basis for the doctrine of *ultra vires*, in the proper sense, is wanting here. That plea presupposes an abuse of authority; a breach of trust. It is most properly set up by shareholders or beneficiaries against directors and trustees acting inconsistently with the purposes of their appointment and of the powers delegated to them, and, with some exceptions as to third persons acting in good faith, and entitled to protection, may be set up by the corporation. But, even then, that plea by the corporation proceeds upon the ground that the act sought to be avoided is prejudicial to the corporators. This doctrine "does not receive favor with the courts" (per MONELL, J., 1 *Abb. Pr. N. S.*, 227), is to "be confined within narrow bounds" (per Lord ST. LEONARDS, 35 *Eng. L. & Eq.*, p. 31 of op.); and the character and proper application of it were with great force and felicity illustrated by COMSTOCK, Ch. J., in *Bissel v. Michigan Southern & N. I. R. R. Co.* (22 *N. Y.*, 258).

If the defendants had assumed to convey this property for an improper purpose, or without the consent of the court, that would have been *ultra vires*. But in this mere contract for the sale of it, there was nothing savoring of a breach of trust, no taint whatever, and the objection is not well taken.

It is further urged that the trustess had no power to extend the time for the delivery of the deed. It would seem that extension was for the benefit of the plaintiffs; it was an act incidental to the general duty with which the trustees were charged in respect to this sale.

Congregation Beth Elohim *v.* Central Presbyterian Church.

I think, therefore, that the deed was tendered, and demand of payment made, at the proper time.

It is also objected that the order of the supreme court, consenting to the sale, had not been filed and entered in the clerk's office prior to that tender and demand. That was a matter of form. If the deed had been declined on that ground the papers could have been filed at once; a mere clerical duty (53 *Barb.*, 412).

Also, that, in addition to the mortgage for twenty thousand dollars, which the plaintiffs were to assume, a mortgage for fifteen thousand dollars had been given. But the satisfaction of that additional mortgage had been obtained, to be delivered if desired. The deeds tendered gave the plaintiffs the option to accept one, therein assuming the fifteen thousand dollar mortgage, in which case the satisfaction piece could have been returned to the insurance company; or, to accept the other and execute a new mortgage for the fifteen thousand dollars according to the contract, in which case the satisfaction would have been entered. Again, it is to be said that the plaintiffs did not decline to proceed on those grounds. Objections which might have been obviated should have been stated; though insuperable objections are not waived by silence. But it appears that they declined for want of means.

On the whole, I am not able to find, either upon principle or authority, that the plaintiffs are entitled to be relieved from the contract, and to recover back the moneys paid.

The defendants' claim for judgment against the plaintiffs for fifty-one thousand dollars, the residue of the purchase price, must be overruled.

In such case, and upon a mere executory contract, the vendor is entitled to recover of the purchaser in default the damages arising from the breach, but nothing more. No such damages have been shown. There has,

Congregation Beth Elchim v. Central Presbyterian Church.

indeed, been the loss of interest on the money unpaid, but it cannot be assumed that the use of the property, whereof the defendants have remained in possession, has not been equivalent to that loss of interest (2 *Wend.*, p. 405 of op.).

In *Richards v. Edick* (17 *Barb.*, 260), Mr. Justice GRIDLEY, at special term, the case coming up on demurrer, reluctantly accepted the doctrine that, upon such default, the vendor might recover the unpaid price of the land contracted to be sold. He cites two cases in the *Tenn. Reports*, decisions not now followed by the courts in England. He also refers to cases (5 *Cow.*, 506; 2 *Wend.*, 399; 2 *Johns.*, 207; 10 *Id.*, 266; 20 *Id.*, 130; 11 *Wend.*, 48; 21 *Id.*, 636, 457), in which he considered that the right of the vendor to recover the price, and not mere damages, was recognized.

In the case in *Cowen*, the plaintiff's claim for the price was allowed without discussion, and on the review the attention of the court was devoted to other questions. One of the cases in 21 *Wendell* was as to personal property. The other cases turned upon questions as to the title, the tender of the deed or of the money, the admissibility of evidence of fraud to impeach a specialty: and some of them, like the case before Mr. Justice GRIDLEY, upon the sufficiency of the pleading. In three of the cases in *Johnson's Reports*, the demurrers to the declarations were sustained on special grounds.

It is evident that no case, coming up on mere demurrer to such a pleading, could determine the rule; the question raised being whether any cause of action existed, rather than as to the amount which should be recovered. It would be everywhere confessed that the vendor of lands, who had kept his contract, could have his action against the purchaser in default. A defendant, not liable for damages on the facts presented by the plaintiff's narration, might well put in a de-

Congregation Beth Elohim *v.* Central Presbyterian Church.

murrer. A defendant thus liable for any amount, the purchase price or less, would not be advised to demur. It would seem, therefore, that Mr. Justice GRIDLEY might well have refrained from stating the rule as to the extent of the purchaser's liability.

In the text-books conflicting opinions have been expressed by writers, but Mr. PARSONS approves of the rule, as settled by the courts in England, that the seller recovers mere nominal damages, unless the land has declined in value (*3 Pars. on Cont.*, 231). But if the lands had not thus declined, and were unproductive, the interest on the money which should have been paid, as well as the reasonable expenses, would go to enhance the damages. The principle is one of mere indemnity: the inquiry—how much has the vendor suffered by the default of the proposed purchaser? In *Laird v. Pim* (*7 Mees & W.*, p. 474 of op.), PARKE, B., states the grounds of the limitation thus: "The vendor "cannot have the land and its value too;" and in the *Eastern Railway Co. v. Hawkes* (*35 Eng. L. & Eq.*, p. 25 of op.), Lord CAMPBELL says, that the vendor can only recover the difference between the stipulated price and the price which it would probably fetch, if resold, together with incidental expenses, and any special damages which he may have suffered; and Lord ST. LEONARDS makes a like statement (p. 34 of op.).

In this last case, those distinguished jurists were contrasting the equitable with the legal remedy—the specific performance, where the vendor wants the contract price, carrying out his purpose, when the action at law would not. The objections which exist to the vendor's recovery of the full price, while he still has the land, with the power to mortgage or convey it to another for value, do not apply to the equitable remedy. In the case of specific performance there could be no perversion of the property. The seller comes into court, saying, "Take the land, and give me the

Congregation Beth Elohim v. Central Presbyterian Church.

money ;" a mere exchange, under judicial supervision.

As a general rule, it would not be wise or just to allow the vendor, holding such an executory contract, and also holding the title to and the possession of the land, to recover the whole price, as if the title had passed or could pass by operation of law. The money might be extorted on final process, and the unfortunate purchaser never get the land. The rule that shall best guard against such results is the most just and reasonable; the most consonant to the equitable qualifications which have entered largely into our law of real property.

Without pausing to state other familiar illustrations, it may be asked, Why is it that, having accepted a deed with full covenants, the title bad, I must lose the contemplated profit which induced the purchase—must lose the money expended in large improvements, before discovering the want of title? Simply because otherwise the grantor, who conveyed in good faith, might be utterly ruined. Or, finding the estate encumbered by a mortgage for fifty-one thousand dollars, contrary to the covenants in the deed, why may I not have judgment against my grantor for that amount, the mortgage still outstanding? Simply because, having got the money, I might never pay the mortgage. A like spirit of equitable provision would lead us to emphasize the statement of Baron PARKE—*the vendor cannot have the land and its value too.*

The justice and propriety of this rule could not be disturbed by attempting to assimilate such a case to cases arising on other contracts, or in respect to personal property. There, as here, the law is characterized by a reasonable regard for the interests of the party chargeable with a breach; and the fair protection and indemnity of the other party is the general rule.

Congregation Beth Elohim *v.* Central Presbyterian Church.

Thus it is that the actual damages are preferred to a gross sum, put as liquidated damages, whenever the terms of the covenant will permit that one employed to labor, and discharged, cannot refuse other proper employment and recover the wages fixed by the contract ; that one to whom freight was to have been furnished in a foreign port, could not refrain from taking other like freight, let his ship come home empty, and claim the stipulated rate of payment in full.

Where, by reason of the unlawful conversion of personal property, the owner recovers the full value, or, on a sale, the vendor the contract price, the title to the property passes to the other party. If such legal effect could follow the vendor's recovery of the price to be paid for land ; the contracting purchaser, on satisfying the judgment, be invested with the proper title, in execution of his contract, the objection to such recovery would be obviated.

It is admitted that one contracting to pay a fixed price for an article to be manufactured, is liable for that price on the article being tendered to him, but that is no indication of the general rule.

On the whole, it will be found, I think, that the analogy between the cases of recovery for lands and for personal property, however particularly followed out, would not militate against the principle I have stated.

In *Sawyer v. McIntyre* (18 *Vt.*, 27), the general rule is said to be that the loss of the bargain constitutes the proper rule of damages, because the property never passed (12 *N. Y.* [2 *Kern.*], p. 48 of op. ; 4 *Id.*, p. 561 of op. ; 20 *Conn.*, 38).

There has been some conflict between the courts of other States upon this question.

In *Alna v. Plummer* (4 *Greenl.*, 258), an action on contract to purchase a pew, held that the price could be recovered and the title claimed afterwards.

Congregation Beth Elohim *v.* Central Presbyterian Church.

In *Tripp v. Bishop* (56 *Penn.*, 424), the deed had been deposited at defendant's request, and the court instructed the jury to find a verdict for the balance of the purchase money, which was affirmed, but, it would seem, without that point having been contested.

In *Whitside v. Jennings* (19 *Ala.*, 784), the court was inclined to a like view, but at the close of the opinion, Mr. Justice COLEMAN said, "It is unnecessary for this court to express an opinion on this point, because, if the court erred, as insisted on, the error resulted to the benefit of the defendant." In that case reduced damages had been found.

In *Old Colony R. R. Corporation v. Evans* (6 *Gray*, 25), Mr. Justice DEWEY notices the conflict of opinion, and says (p. 35 of op.), "Upon more full consideration of the question of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered to him, the court are of opinion that the proper rule of damages, in such a case, is the difference between the price agreed to be paid for the land and the saleable value of the land at the time the contract was broken."

It has been said that in States where law and equity powers are combined in the same court, the objection to allowing such price to be recovered might not be so formidable as elsewhere; but there is nothing in the suggestion. Where the claim is presented, as in this instance, the true measure of liability must be adopted, whatever it may be. So also, if the action were brought for such price, and the contracting purchaser were in default for want of sufficient means, and therefore unable to claim a specific performance, our equity powers would not enable us to qualify the verdict.

It might well be suggested, however, that where the courts are open to the vendor to claim specific performance, it would be desirable if he could obtain the whole price only by resorting to that remedy for an enforced exchange of the land for the money.

Congregation Beth Elohim *v.* Central Presbyterian Church.

With us, if we lay out of view a case in the superior court of New York, mentioned by Mr. SEDGWICK, in his work on damages (p. 205, 5 ed., note), the question had not received deliberate consideration by the courts prior to the case of *Richards v. Edick* (*supra*). It would seem, therefore, that Mr. Justice GRIDLEY might well have regarded the question as remaining open for consideration, and determined that case according to his own convictions.

But in 1863, about ten years after the decision of the *Richards* case, the question was determined in *Wilson v. Holden*, (16 Abb. Pr., 133). Mr. Justice INGRAHAM states clearly, and without hesitation, that the vendor recovers of the defaulting purchaser the damages, as distinguished from the price.

It may be said that these defendants, by tendering the conveyance, have performed the agreement on their part. But that was necessary to protect themselves, and to lay a foundation for damages should the property decline in value. They still owned the land, and, in view of the plaintiff's default, might have sold it to other parties.

The remaining question arises upon the plaintiff's reply to the answer. The learned counsel for the plaintiff claims that the defendants should have proved that they had the title to their property. If the counter-claim set up could be allowed, that point would deserve consideration, as it certainly would had the action been brought to recover the unpaid consideration, and the answer had raised the question as to the title. But by this complaint no such issue is tendered, and the vendor, to resist the claim of the purchaser to recover back what has been paid, need not prove his title, unless the same has been in some degree impeached, and the issue joined casts upon him that burden.

The complaint must be dismissed, but without costs.

DIGEST
OF
ALL POINTS OF PRACTICE
EMBRACED IN
THE STANDARD NEW YORK REPORTS,

Issued during the period covered by this volume:

Viz.—58 BARBOUR; 10 ABBOTT'S PR. N. S.; 40 HOWARD'S PR.;—
And in the *General Laws of 1871*.

ABATEMENT.

Although, as a general rule, a cause of action in favor of two partners or joint contractors survives to the survivor, and an action upon it cannot be continued in the name of the personal representative of one deceased, nor can such representative be joined in an action, yet, where a judgment recovered by two partners has been satisfied as against one and not as against the other, and the latter dies, the action may be continued in the name of the legal representative of the latter. *Supreme Ct.*, 1870, *Hackett v. Belden*, *Ante*, 123.

ASSIGNABILITY OF CAUSE OF ACTION.

ACCOUNT.

BILL OF PARTICULARS.

ACCOUNTING (ACTION FOR).

ACTION, 2.

ACTION.

1. Action lies between trustees of manufacturing corporation, in case of liability for corporate debt. *Laws of 1871*, ch. 657.

ACTION.

2. In an action by one member of a dissolved partnership against the other, in which the complaint alleges an account had, and promise to pay the balance struck, an accounting cannot be ordered. *Supreme Ct.*, 1870, *Short v. Barry*, 40 *How. Pr.*, 210.
3. In an action between such parties in which no balance struck and promise to pay, are shown, a judgment without an accounting cannot be sustained. *Supreme Ct. Sp. T.*, 1870, *Bouton v. Bouton*, 40 *How. Pr.*, 217.
4. Jacob and Joseph Stiner had adjoining stores, carrying on similar business; and Jacob applied to a third person for a lease of another store, who on coming to negotiate for the lease entered by mistake the store of Joseph, and on stating his errand with Jacob, Joseph replied, "you can do the business with me," and Joseph thus secured the lease in his own name.—*Held*, that an action by Jacob against Joseph and the lessors, to have the lease transferred, would not lie. *Supreme Ct.*, 1871, *Stiner v. Stiner*, 58 *Barb.*, 643.
5. It is only where parties stand in a confidential relation to each other, that one can compel the other to hold as trustee for him. *Ib.*
6. Where the summons is for relief, and the complaint alleges a contract to pay money, and fraud on defendant's part in making the contract, and demands judgment for damages sustained by reason of the fraud, in a sum exceeding the face of the contract, the action is to be deemed as sounding in tort and not in contract, and the averment of the contract is to be deemed matter of inducement merely. *Ct. of Appeals*, 1871, *Elwood v. Gardner*, *Ante*, 238.
7. In such case defendant is not bound to move, before trial, to vacate an order of arrest; and plaintiff cannot, by abandoning at the trial his averment of fraud, and obtaining judgment on proof of the contract alone, preclude the defendant from subsequently moving to set aside execution issued thereon against the person. *Ib.*
8. A party against whom a local assessment has been imposed, cannot join with himself all other persons against whom similar assessments have been made, as parties plaintiff in an action to restrain the collection of the tax; since such a tax gives no lien upon any common property owned by the plaintiffs, but only upon their separate lots. *Supreme Ct. Sp. T.*, 1868, *Thurston v. City of Elmira*, *Ante*, 119.
9. The objection is available on demurrer for defect of parties and for not stating cause of action. *Ib.*
10. An action lies to recover back from the depositary, moneys contributed by plaintiffs, to be used in another country in aid of a revolutionary struggle against a government at peace with the

APPEAL.

United States, but which have not been so applied before suit brought. *N. Y. Superior Ct.*, 1871, Bailey *v.* Belmont, *Ante*, 270.

BROKER; CAUSE OF ACTION; DECEIT; INJUNCTION; JUDGE; LIMITATION OF ACTIONS; MALICIOUS PROSECUTION; SALE; SLANDER; TAXES; VENDOR AND PURCHASER.

ADJOURNMENT.

IMPRISONMENT, 1.

ALIMONY.

1. The court have power to grant temporary alimony to a wife pending an action *against her* for divorce. *Ct. of Appeals*, 1871, Leslie *v.* Leslie, *Ante*, 64; *N. Y. Superior Ct. Sp. T.*, 1871, Ford *v.* Ford, *Ante*, 74.
2. On settling a decree on the discontinuance of a divorce suit, the court have power to award an additional allowance to the wife, for counsel fee for *past* services. *N. Y. Com. Pl.*, 1870, Green *v.* Green, 40 *How. Pr.*, 465.
3. In the ordinary case of the disobedience of an order to pay *ad interim* alimony, the court has no power to punish, otherwise than by a committal to prison, under 2 *Rev. Stat.*, 535, § 4. *N. Y. Superior Ct. Sp. T.*, 1871, Ford *v.* Ford, *Ante*, 74.

AMENDMENT.

The court has always power to vacate orders, judgments and decrees, entered irregularly and without jurisdiction. *N. Y. Com. Pl. Sp. T.*, 1871, Matter of Rosenberg, *Ante*, 450.

INSOLVENT, 2, 3.

ANSWER.

DIVORCE, 1.

APPEAL.

1. A decision rendered by a court of record, upon default of the appellant, is not appealable. *N. Y. Com. Pl.*, 1869, Baker *v.* Stephens, *Ante*, 1.
2. An order made at special term, denying a motion to strike out allegations from a complaint as irrelevant, is not appealable. *N. Y. Com. Pl.*, 1871, Hughes *v.* Mercantile Mutual Ins. Co., *Ante*, 87; *Supreme Ct.*, 1870, Murphy *v.* Dickinson, 40 *How. Pr.*, 66.
3. Where the plaintiff's affidavit set forth that the trial would involve

APPEAL.

the examination of a long account, and defendant's affidavit did not deny this, but referred to a bill of particulars of plaintiff's claim, which though containing three items only, seemed to be gross charges for much work and labor performed during a long period.—*Held*, that sufficient was shown for the exercise of the judge's discretion in granting an order of reference, and that such order was not appealable. *N. Y. Com. Pl.*, 1870, *Thompson v. Seimer*, 40 *How. Pr.*, 246.

4. To make an order appealable from the special to the general term, it must affect a substantial right. But the fact that it involves an exercise of discretion, does not necessarily prevent such appeal. *Ct. of Appeals*, 1870, *Matter of Duff*, *Ante*, 416.
5. The general term cannot dismiss an appeal, simply because the order appealed from is discretionary. *Ib.*

The general term may, if satisfied that injustice has been done, set aside an order made by a previous term, and rehear the case. *Ib.*

6. What is a "substantial right?"—discussed per *GROVER*, J. *Ib.*
7. An appeal lies to the general term, from an order of the special term setting aside a report of commissioners awarding damages for lands taken for a railroad. *Supreme Ct.*, 1865, *Albany & Susquehanna R. R. Co. v. Dayton*, *Ante*, 182.
8. The Code does not allow an appeal to the court of appeals from an order sustaining or overruling a demurrer. *Ct. of Appeals*, 1871, *Ferris v. Aspinwall*, *Ante*, 187.
9. Final judgment must be given upon the demurrer before the court of appeals can review it. *Ib.*
10. An order denying a motion to set aside an order of reference, after notice of election to end it, upon the referee's failure to report in sixty days after final submission of the cause, is one affecting a substantial right, is interlocutory, and involves no question of discretion. It is, therefore, appealable to the court of appeals. *Ct. of Appeals*, 1870, *Gregory v. Cryder*, *Ante*, 289.
11. An appeal will not be dismissed on the ground that the appellant has violated a stipulation by which he obtained a stay of proceedings pending the appeal. *N. Y. Com. Pl.*, 1869, *Baker v. Stephens*, *Ante*, 1.
12. If the special term, on a motion to discharge an order of arrest, has determined that there was or was not a clear weight of evidence in the defendant's favor, the general term, on appeal, ought not to disturb such determination. *N. Y. Superior Ct.*, 1870, *Faris v. Peck*, *Ante*, 55.
13. Judgment on the report of a referee will not be reversed at general term, on the ground that the action was not referable. A direct

ARREST.

appeal from the order of reference is necessary. *Supreme Ct.*, 1870, *Terry v. McNiels*, 58 *Barb.*, 242.

14. Striking conflict of evidence, and apparent exaggeration by the witnesses of the prevailing party, not ground of reversal of the judgment on a referee's report. *Baker v. Spencer*, 58 *Barb.*, 248.

15. In a judgment in partition, error in the adjudication of the interests of the respective parties is ground of reversal and a new trial. It should not be left to be corrected on the distribution of the proceeds, after sale. *Supreme Ct.*, 1870, *Hobart v. Hobart*, 58 *Barb.*, 296.

16. The court on appeal will not interfere with the amount of an allowance granted by the judge at the trial, except in a glaring case of excessive allowance. *Supreme Ct.*, 1871, *Oneida National Bank v. Stokes*, 58 *Barb.*, 508.

17. If the case does not show the ground of a motion to dismiss the complaint which was denied, the court will not reverse the judgment because an essential fact was not proved, which might have been proved if the objection had been stated at the trial. [6 N. Y., 345; 37 Id., 526.] *Supreme Ct.*, 1871, *Devoe v. Brandt*, 58 *Barb.*, 493.

18. An appeal to a superior court from an order of an inferior court, which brings up to the appellate court only copies or transcripts of the papers,—as distinguished from an appeal from the judgment, which removes the record,—does not in general enable the appellate court to give judgment. [1 Ld. Raym., 5, 10.] Though it is otherwise in the court of appeals. *Supreme Ct.*, 1870, *Barker v. Wing*, 58 *Barb.*, 73.

ARBITRATION; CASE; COUNTY COURT; SERVICE (and proof of), 3; SURROGATES' COURTS, 6, 7; TRIAL, 11.

APPEARANCE.

In general, a statute allowing the appearance of a party before a tribunal imports a personal appearance. *Supreme Ct.*, 1871, *People ex rel. Longwell v. McMaster*, *Ante*, 132.

ARBITRATION.

The party aggrieved by the judgment entered on an award of arbitrators under the statute, cannot review it by making a case and appealing, except for the errors specifically provided for by the statute. *Supreme Ct.*, 1871, *Dibble v. Camp*, *Ante*, 92.

ARREST.

1. Arrest may be ordered of a defendant within the jurisdiction,

ASSESSMENT.

without reference to where the fraud was committed, or whether the property was ever brought here. *Supreme Ct. Sp. T.*, 1870, *Brown v. Ashbough*, 40 *How. Pr.*, 226.

2. A banker who receives a remittance from his correspondent, with instructions to send a draft for the amount to a third person, and acknowledges its receipt subject to such instructions, is liable to arrest if he appropriates it to his own use. *Supreme Ct.*, 1871, *Johnson v. Whitman*, *Ante*, 111.
3. To make out a charge of fraud in contracting the debt sued for, *scienter* must be shown. [18 N. Y., 299; 42 Barb., 470; 40 N. Y., 562, 575.] *Supreme Ct. Sp. T.*, 1870, *Brown v. Ashbough*, 40 *How. Pr.*, 226.
4. Defendant made a purchase of goods on a short credit of thirty days, and within that time became insolvent, furnishing no explanation of the fact.—*Held*, that it was a fraudulent contracting of the debt, within section 179 of the Code, and an order of arrest consequently must be sustained. *Supreme Ct. Sp. T.*, 1871, *Dale v. Jacobs*, *Ante*, 382.
5. One who left his domicil in Canada, and came to Buffalo, avowing his intent to remain there, and making efforts to procure a residence and place of business there,—*Held*, to have acquired a residence, so as not to be liable to arrest, even before the removal of his family. *Brown v. Ashbough*, 40 *How. Pr.*, 260.
6. In actions where the cause of action and the facts which authorize an arrest are the same, the court will not, ordinarily, try the merits upon a motion to vacate the arrest. *N. Y. Superior Ct.*, 1870, *Faris v. Peck*, *Ante*, 55.
7. If the original affidavits made out against the defendant a *prima facie* case of a cause of action authorizing an arrest, the court will not set aside the order, unless the proof adduced by the defendant is so clearly preponderating as to leave no reasonable doubt of his success on the trial. *Ib.*
8. Where the cause of action and the facts on which an order of arrest is granted are identical, the defendant need not move before trial to set aside the order of arrest, but may at the trial contest the facts relied on as a ground of arrest, and if they are not proved at the trial, an execution against the person cannot be issued. *Ct. of Appeals*, 1871, *Elwood v. Gardner*, *Ante*, 238.

FRAUD; IMPRISONMENT; INSOLVENT.

ASSESSMENT.

1. The principle upon which an assessment was made, was not, under the act of 1858 (*Laws of 1858*, p. 574, § 2), the subject of review.

ATTACHMENT.

An error in the principle is not a "legal irregularity," within the meaning of that act. *Supreme Ct.*, 1871, *Matter of Eager, Ante*, 229.

2. Under the act of 1813 (§ 178, Act of 1813, *Valentine's Laws*, p. 1198), any objection to the awards or assessments of the commissioners in a local assessment in the city of New York, must be made before confirmation of the commissioners' report. *Supreme Ct.*, 1870, *Morning Side Park Case, Ante*, 338.
3. *It seems*, that the court has no power to alter the report, it being for the commissioners to alter or correct it in accordance with the directions of the court. *Ib.*
4. When the report is confirmed, the commissioners are *functi officio*, and a motion to correct the report cannot be granted. *Ib.*
5. If the owner of land which is taken means to rely on the report as originally prepared, he must see that it is not, at the instance of any subsequent claimant, altered to his prejudice. *Ib.*
6. The proceedings under the act of 1813 explained. *Ib.*

ACTION, 8; NEW YORK, 9.

ASSIGNABILITY OF CAUSE OF ACTION.

A cause of action for damages for falsely and fraudulently misrepresenting the value of specific property—in this case a bond and mortgage—whereby the person deceived was induced to take it in exchange for other property, is assignable, for such a cause survives to and against personal representatives. [19 N. Y., 464.] *Supreme Ct.*, 1870, *Graves v. Spier, 58 Barb.*, 349.

ATTACHMENT.

1. After an attachment, issued as a provisional remedy under the Code of Procedure, has been set aside, as not authorized by the facts of the case, an undertaking given to procure the discharge of property levied on under the attachment cannot be enforced. *Supreme Ct. Circuit*, 1871, *Bildersee v. Aden, Ante*, 163.
2. An attachment for contempt, being regular upon its face, and containing all the recitals essential to confer jurisdiction, the party moving to set it aside upon the ground of defects in the proceedings upon which it was founded, or for a failure to serve an affidavit of the facts charged as constituting the contempt, must show affirmatively the defect or omission, or, by affidavit in support of his motion, must create such a presumption as will throw upon the other party the *onus* of proving that his proceedings are regular. *N. Y. Com. Pl.*, 1869, *Baker v. Stephens, Ante*, 1.

BAIL.

ATTORNEY AND CLIENT.

1. Court of appeals to establish rules for admission of attorneys. *Laws of 1871*, ch. 486.
2. Rules established accordingly. *Ante*, 147, note.*
3. An attorney has implied authority to consent to the reference of an action for tort. *Supreme Ct.*, 1870, *Tiffany v. Lord*, 40 *How. Pr.*, 481.
4. The fidelity of an attorney to his client's interests forbids his trafficking, in the smallest degree, with such interests, by collusion or otherwise, with persons who, in respect to such interests, have occupied an attitude of hostility towards his client. *N. Y. Superior Ct.*, 1871, *Hatch v. Fogerty*, *Ante*, 147.
5. If he has advised or assisted the client in proceedings, he cannot afterward use the knowledge he has acquired, to secure a pecuniary benefit to himself, adverse to the client's interest, by an attack on the proceedings, even should it appear that such proceedings were wrongful. *Ib.*
6. An attorney's claim for services is not to be defeated on the mere ground that they produced no beneficial result, but only when their uselessness to the client was by reason of negligence, or a want of proper skill on the part of the attorney. Where the correctness of the advice given by the attorney depended on the construction of a will, and also of the force and effect of a statute,—*Held*, that the statute not having been authoritatively interpreted, it was a fair question for the consideration and professional judgment of the attorney, who was therefore entitled to compensation for his services. *Ct. of Appeals*, 1869, *Bowman v. Tallman*, 40 *How. Pr.*, 1; affirming 2 *Robt.*, 385; *S. C.*, 27 *How. Pr.*, 212.

AWARD.

The party aggrieved by the judgment entered on award of arbitrators under the statute, cannot review it by making a case and appealing, except for the errors specifically provided for by the statute. *Supreme Ct.*, 1871, *Dibble v. Camp*, *Ante*, 92.

BAIL.

It is a good defense to an action against bail, that the judgment against the principal has been reversed on appeal. It is only when

* By amendment of June 14, these rules do not preclude those who had been studying for the year before May 1, 1871, from applying before June 1, 1872, nor graduates of the New York University, commencing study in the law department thereof, before May 1, 1872.

BOARD OF HEALTH.

the reversal is had after time to answer expires, that the bail are put to a motion for relief. *Supreme Ct. Sp. T.*, 1870, *Short v. Hooker*, 40 *How. Pr.*, 420.

BANKRUPTCY.

1. The U. S. bankrupt law is paramount and exclusive, and suspends the operation of the insolvent laws of this State, over all the cases within its purview. *Supreme Ct. Sp. T.*, 1870, *Shears v. Solhinger*, *Ante*, 287.
2. But it does not suspend those laws which confer upon the State courts the right to discharge the person from imprisonment. *Ib.*

IMPRISONMENT, 3.

BENEVOLENT CORPORATIONS.

1. The consent and approbation of a justice, required by the general law for the incorporation of benevolent societies (*Laws* of 1848, ch. 319), as a condition precedent to filing the certificate, is not conclusive upon the secretary of state, nor upon the court, upon the question whether an association, as its objects are stated in the certificate, is within the purview of the statute. *Supreme Ct. Sp. T.*, 1871, *People ex rel. Blossom v. Nelson*, *Ante*, 201.
2. A corporation cannot be formed under that act to provide a "relief fund," and "to aid persons of moderate pecuniary resources in obtaining from a respectable insurance company insurance on their lives, and in maintaining the necessary payments on the same, and to secure to families of persons so insured an immediate advance of funds in case of death." *Ib.*
3. In general, associations for lending money, however excellent the objects, are not within the statute. *Ib.*

BILL OF PARTICULARS.

Service of an account ordered in an action for goods sold; and appeal from the order dismissed because defendant, after appealing, had complied with it. *Saupe v. Bush*, 40 *How. Pr.*, 191

BOARD.

DEMAND BEFORE SUIT; SERVICE (and proof of), 5.

BOARD OF HEALTH.

1. Acts of the legislature (*Laws* of 1866, chs. 872, 873), having fixed the standard of, and the mode of keeping, petroleum, &c., it is not competent for a board of health to impose additional restrictions.

CASE.

N. Y. Com. Pleas, 1870, Metropolitan Board of Health *v.* Schmades, *Ante*, 205.

2. A general power given to a board of health to make ordinances not inconsistent with law, does not sanction the making of such additional restrictions. *Ib.*

BROKER.

Bonds purchased and carried by a broker on marginal security, are held by him as a *pledge* for the payment of advances made by him on their purchase; and a sale without authority, and without notice, is an *unlawful conversion*, and renders the broker liable for any subsequent enhancement of their market value; not strictly on a contract, but in a special action on the case to recover damages for a wrong. *Brooklyn City Ct.*, 1871, Read *v.* Lambert, *Ante*, 428.

2. A demand, since it would be nugatory, need not be made before bringing such action, though it would be otherwise if the broker had only pledged the stock in good faith for the amount due him. *Ib.*

3. After a tender of the bonds and demand of payment, and notice of sale given after default, the net proceeds would have been the measure of the broker's liability, upon a claim *for money received* to the plaintiff's use. *Ib.*

BROOKLYN.

1. Under the charter of Brooklyn, as amended in 1862, an action will not lie against the city for nonfeasance or misfeasance on the part of the public officers. *Ct. of Appeals*, 1869, Gray *v.* City of Brooklyn, *Ante*, 186.

2. A power conferred upon the common council of Brooklyn, cannot be exercised without the concurrence of the mayor, for, by the charter, the mayor and board of aldermen form the common council. *Supreme Ct.*, 1869, Cassidy *v.* City of Brooklyn, *Ante*, 297

CALENDAR.

SURROGATES' COURTS, 7, TRIAL 3.

CARRIER.

PARTIES, 2.

CASE.

1. When, on a trial, defendant's counsel moved to strike out oral evidence, on the ground that it appeared that there was written evi-

COMPENSATION.

dence on the same matter, which plaintiff was bound to produce; and plaintiff was subsequently nonsuited; and, on appeal to the court of appeals, it did not appear, from the case made, what disposition was made of the motion;—*Held*, that the court of appeals would, if necessary to sustain the judgment, presume that the motion to strike out was granted. *Ct. of Appeals*, 1870, Chesebrough *v.* Tompkins, *Ante*, 379.

2. Unless special reason therefor be shown, an exception taken at the trial by the *respondent* must not be incorporated in the printed case on appeal. *N. Y. Superior Ct.*, 1870, Dabney *v.* Stevens, *Ante*, 39.

CAUSE OF ACTION.

One who obtains possession of stock belonging to another person of the same name, and transfers it fraudulently to a third person, is liable to an action for fraud and deceit by one who in good faith takes from the latter a transfer for value; and he may be arrested therein. *N. Y. Superior Ct.*, 1870, Faris *v.* Peck, *Ante*, 55.

ACTION; COMPLAINT; INJUNCTION, 1; PARTIES; SALE; VENDOR AND PURCHASER.

CERTIFICATE.

BENEVOLENT CORPORATIONS, 1.

CERTIORARI.

1. The supreme court has power to review proceedings of a county court as well on the question of fraud on the debtor's part under the "discharge from imprisonment" act (2 R. S. 31), as in respect to the jurisdiction of the county court. [2 Seld. 309.] *Supreme Ct.*, 1869, People *ex rel.* Galsten *v.* Brooks, 40 *How. Pr.*, 165.
2. A common law *certiorari* is a special proceeding, within the terms and intent of the Code; and the supreme court has power to award costs in such cases in their discretion. [Reviewing cases, and denying 6 Abb. Pr. N. S., 63; 39 N. Y., 506.] *Supreme Ct.*, 1870, People *ex rel.* Spencer *v.* Fuller, 40 *How. Pr.*, 35.

CLERK.

In counties of 100,000 population the county clerk may appoint special deputies. *Laws of 1871*, ch. 710.

COURT.

COMPENSATION.

1. The compensation to be awarded to an owner, part of whose lands

COMPLAINT.

are taken by a railroad company, should include a just compensation, 1. For the value of the part taken, and, 2. For the effect which the taking will have in depreciating the market value of what is left. *Supreme Ct.*, 1865, *Albany & Susquehanna R. R. Co. v. Dayton*, *Ante*, 182.

2. An award which includes both these elements should not be set aside because the commissioners did not allow for "the inconveniences" to the residue in respect to the owner's use. *Ib.*
3. The rule laid down in *Canandaigua & Niagara Falls R. R. Co. v. Payne* (16 *Barb.*, 273),—approved. *Ib.*
5. Where the commissioners allowed five hundred dollars for the taking of a strip of land worth sixty dollars from the defendant's mill site;—*Held*, that although the opinions of witnesses stated the depreciation of the mill property at from one thousand to twelve hundred dollars, the award should not be set aside. *Ib.*

COMPLAINT.

1. Facts extrinsic to the cause of action, which are relied on as a ground of arrest, should not be alleged in the complaint. *Ct. of Appeals*, 1871, *Elmore v. Gardner*, *Ante*, 238.
2. Where the summons is for relief, and the complaint alleges a contract to pay money, and fraud on defendant's part in making the contract, and demands judgment for damages sustained by reason of the fraud, in a sum beyond the face of the contract, the action is to be deemed as sounding in tort and not in contract, and the averment of the contract is to be deemed matter of inducement merely. *Ib.*
3. In such case defendant is not bound to move, before trial, to vacate an order of arrest, and plaintiff cannot, by abandoning at the trial his averment of fraud, and obtaining judgment on proof of the contract alone, preclude the defendant from subsequently moving to set aside execution issued thereon against the person. *Ib.*
4. In an action by seller against buyer, for failure to take stock, at the day fixed, the stock being one that has a daily market price, it is not necessary to aver a resale, nor to aver that plaintiffs had kept the stock and were ready to deliver it. [15 *Wend.*, 493; 38 *Barb.*, 209.] *Supreme Ct.*, 1871, *Merriam v. Kellogg*, 58 *Barb.*, 445.
5. In a complaint for the wrongful detention of personal property, an allegation of demand and refusal before suit, is not necessary; but an allegation of ownership in plaintiff is necessary. *N. Y. Superior Ct.*, 1871, *Schofield v. Whitelegge*, *Ante*, 104.
6. Alleging detention "from the plaintiff" is not enough. *Ib.*
7. A complaint which does not aver ownership in the plaintiff is fatally defective, and may be dismissed on motion at the trial. *Ib.*

COMPLAINT.

8. It may be conceded that if a complaint contains only what was necessary in a declaration in trover, a right to immediate possession, or a demand and tender, would be necessary; but in a complaint alleging facts which would sustain a special action on the case, the mere use of the term conversion does not render a demand, &c., necessary. *Brooklyn City Ct.*, 1871, *Read v. Lambert*, *Ante*, 428.
9. To determine the rights and liabilities of the parties, pleadings are to be liberally construed. *Ib.*
10. A complaint is not to be dismissed at the trial if facts alleged in it, although inartificially or with unnecessary matter, constitute a cause of action, and are substantiated by proof. *Ib.*
11. In an action in the nature of trover for the value of chattels, the omission to allege demand is cured by a recovery upon proof of demand, without objection. *Supreme Ct.*, 1870, *Fullerton v. Dalton*, 58 *Barb.*, 236.
12. A complaint against a married woman upon her contract, on which plaintiff is entitled to satisfaction out of her separate estate, need not allege that she has a separate estate. Married women are now to be sued, in such case, as if *sole*. *Supreme Ct.*, 1870, *Sigel v. Johns*, 58 *Barb.*, 620.
13. The complaint stated that the plaintiff and defendant were co-partners; that they dissolved partnership on a certain day, when it was agreed that an inventory should be taken of the assets of the firm, including the notes and accounts due to it, and that the defendant should pay the plaintiff one-half of the amount of the inventory, deducting a certain debt, and also one-half the liabilities of the firm, which the defendant assumed to pay; and that thereupon such inventory was taken, the precise amount due the plaintiff was ascertained and agreed upon, and that the defendant went into possession, and had ever since held possession, and demanded an accounting.—*Held*, that the complaint was clearly an action at law, and that the demand for an accounting, was nugatory, as inconsistent with the allegations. *Supreme Ct.*, 1870, *Short v. Barry*, 40 *How. Pr.*, 210.
14. A father, suing for an equitable allowance for the past maintenance of his infant children, should state a special case showing the extent of his means at the time such support was furnished, and the particulars of the extraordinary expenditures for the actual benefit of the infants, which created an equitable claim in his favor. [2 *Barb. Ch.*, 375.] *Supreme Ct. Sp. T.*, 1870, *Smith v. Geortner*, 40 *How. Pr.*, 185.
15. A complaint *held* bad on demurrer for joining a cause of action against a defendant individually, together with other causes of ac-

CONTEMPT.

tion against him as trustee, and with separate demands against other defendants. *Ib.*

16. If the complaint states facts constituting a cause of action for damages, and asks judgment for damages, the action is to be deemed one of a legal rather than an equitable nature, although unnecessary allegations are inserted, and the prayer for damages is coupled with a demand in the alternative for specific relief, to which the plaintiff proves to be not entitled. *Supreme Ct.*, 1870, *Graves v. Spier*, 58 *Barb.*, 349.

COMPOUNDING OFFENSES.

CONTRACTS, 2.

COMPROMISE.

CONTRACTS, 2.

CONSTITUTIONAL LAW.

1. The act of April 13, 1857, § 3,—providing for the giving of an undertaking on removing a cause from a district court in New York city,—affects the remedy only; it does not impair the obligation of a contract, or take away any vested right, and, therefore, is not unconstitutional. *N. Y. Com. Pl. Sp. T.*, 1870, *Johnson v. Ackerson*, 40 *How. Pr.*, 222.
2. The act (*Laws of 1862*, p. 203, § 39) amending the charter of the city of Brooklyn (*Laws of 1854*, p. 860, ch. 384), by exempting the city from liability for nonfeasance, &c., of city officers, is not unconstitutional as impairing the obligation of contracts, or as conflicting with section 3 of article VIII. of the Constitution of the State of New York, which provides that all corporations may sue and be sued, as natural persons. *Ct. of App.*, 1869, *Gray v. City of Brooklyn*, *Ante*, 186.
3. That section of the constitution was intended to confer on corporations the capacity to be sued, not to define the cases in which suits may be maintained against them. *Ib.*
4. The words "this act," in section 39 of the amendatory act (*Laws of 1862*, p. 203), must be construed as referring to the charter of 1854, as amended, and not merely to the amendatory act. *Ib.*
5. That section was intended, not to divest persons affected thereby of their rights, but to change and limit their remedies. *Ib.*

CONTEMPT.

The distinction between contempt of an order "to pay a sum of

CORPORATIONS.

money," and contempt of other orders,—explained. *Ford v. Ford*, *Ante*, 74.

ALIMONY; ATTACHMENT, 2.

CONTRACTS.

1. Moneys may lawfully be subscribed *here*, to be used in another country to aid it in a revolutionary struggle against a government at peace with the United States, if no violation of the neutrality laws be committed. *N. Y. Superior Ct.*, 1871, *Bailey v. Belmont*, *Ante*, 270.
2. Where a person is arrested and imprisoned, on a complaint for false pretenses, and before the examination a note is given by several persons for the amount of the claim, together with charges incidental to the arrest, the consideration being the abandonment of the prosecution,—the consideration is illegal, and the note void, by reason of its being an agreement to compound a felony. *Supreme Ct.*, 1870, *Conderman v. Trenchard*, 40 *How. Pr.*, 71.
3. It is not necessary to prove, *in terms*, the agreement to compound a crime, in order to render the note invalid. If it is apparent that such was the intention of the parties, and the agreement was such as to carry out the intent, it is enough. *Ib.*
4. Neither is it necessary, to render the note invalid, that the person receiving the consideration should agree not to commence new proceedings against the person accused. It is enough that he obligates himself to release the accused person from the *pending* prosecution. *Ib.*
5. An agreement not to give evidence or to stifle a prosecution, is just as corrupt as an agreement to compound a crime. *Ib.*

CORPORATIONS.

1. Corporations may contract for the sale of real estate without the common seal; and the use of the individual seals of the corporate officers does not vitiate the contract. *Brooklyn City Ct.*, 1871, *Congregation Beth Elohim v. Central Presb. Ch.*, *Ante*, 484.
2. The objection that a devise to a corporation will make its property exceed the charter limit, is not available to defeat its claim under the will, but can only be raised in a direct proceeding by the State. [14 Pet., 128.] *Supreme Ct.*, 1871, *Rainey v. Laing*, 58 *Barb.*, 453.
3. A subscriber to railroad stock, who has been forced to pay a part of his subscription by judgment, the remainder having been adjudged barred by the statute of limitations, is entitled to a certificate for the stock. *Supreme Ct. Sp. T.*, 1870, *Johnson v. Albany & Susquehanna R. R. Co.*, 40 *How. Pr.*, 193.

COSTS.

4. *It seems*, that a resolution forfeiting stock for non-payment of installments must specify the stock. *Ib.*
5. A person dealing with an officer of a corporation whose duties are regulated by the by-laws, is chargeable with notice of his authority, and of the restrictions on it contained in them and in the act of incorporation. *N. Y. Superior Ct.*, 1870, *Dabney v. Stevens, Ante*, 39.

BENEVOLENT CORPORATIONS; MANUFACTURING CORPORATIONS; MUNICIPAL CORPORATIONS.

COSTS.

1. Where a plaintiff in an action in the supreme court claimed damages for five hundred dollars, and the actual value of the property affected was three hundred dollars, and he recovered less than fifty dollars,—*Held*, that he was entitled to costs under section 304 of the Code, giving to the plaintiff costs, whatever may be the amount of the recovery, “in actions in which a court of justice of the peace has no jurisdiction,” and under section 53, limiting the jurisdiction of a justice of the peace to actions where the damages claimed do not exceed two hundred dollars. *Supreme Ct.*, 1870, *Ryan v. Doyle*, 40 *How. Pr.*, 215.
2. Where, on the trial, a verdict is rendered for the defendant, and a motion on the part of the plaintiff for a new trial is granted, and thereupon the defendant appeals from such order to the general term, where it is affirmed with costs,—plaintiff is entitled to the costs of the appeal from the order for a new trial, although judgment be rendered finally against him. *Supreme Ct.*, 1870, *Stevenson v. Pusch*, 40 *How. Pr.*, 91.
3. Where an order may be made, generally, “with costs,” it must, from the nature of the case, be intended to be in favor of the party succeeding on the proceeding for which the costs are allowed. *Ib.*
4. Where a verdict is had at the circuit, and the court directs the exceptions to be heard in the first instance at general term, if the general term direct judgment for the plaintiff, he is entitled to costs of the general term, as well as costs for previous proceedings in the cause, even though the verdict be reduced. *Supreme Ct.*, 1870, *Duff v. Wardell, Ante*, 84.
5. It makes no difference that the defendant is sued as executor. *Ib.*
6. On an appeal from a judgment, after trial by jury, and an appeal from an order denying a motion for a new trial, the New York superior court allow costs of two appeals to be taxed, although both appeals be heard together and on one set of papers. *N. Y. Superior Ct.*, 1871, *Matthews v. Wood, Ante*, 328.

COUNTRY TREASURER.

7. It makes no difference that the motion for a new trial was made on the judge's minutes. *Ib.*
8. On an appeal from a judgment and an appeal from an order denying a motion for a new trial, the supreme court does not allow costs of two appeals to be taxed, when both appeals are heard together and on the same set of papers. *Supreme Ct.*, 1871, *Van Alen v. American National Bank*, *Ante*, 331.
9. On appeal from an order, the court may allow the successful party, in addition to the costs, the disbursements for printing the papers and points. *Supreme Ct.*, 1870, *Erie Railw. Co. v. Ramsey*, *Ante*, 109.
10. No power to award costs on dismissing proceedings for a want of jurisdiction, which appears on the face thereof. [36 Barb., 247.] *Humiston v. Ballard*, 40 *How. Pr.*, 40.
11. An act for the protection of working women other than domestics or servants, allows them in suits in justices' or district courts in New York or Brooklyn, for wages or materials, five or ten dollars in addition to the costs recovered. *Laws of 1871*, ch. 936.

CERTIORARI, 2; JUSTICES' COURTS; MECHANICS' LIEN; MOTIONS AND ORDERS; SHERIFF; SURROGATES' COURTS.

COUNTRY COURTS.

1. Jurisdiction conferred over proceedings under swamp drainage act of 1870. *Laws of 1871*, ch. 303.
2. A county court can order the reference of a cause of a referable nature, pending therein. [Code of Pro., §§ 271, 366.] *Supreme Ct.*, 1869, *Coy v. Rowland*, 40 *How. Pr.*, 385.
3. An appeal from an order of the county court granting a new trial, as distinguished from an appeal from a judgment, brings to the supreme court only the papers on which the order was made. The action remains in the county court, and the supreme court, on reversing the order, cannot enter judgment. *Supreme Ct.*, 1870, *Barker v. Wing*, 58 *Barb.*, 73.

CERTIORARI; COUNTY JUDGE; IMPRISONMENT.

COUNTRY JUDGE.

Orders for service of summons by publication, made by county judges before January 1, 1870, legalized. *Laws of 1871*, ch. 551, amending *Laws of 1865*, p. 766, ch. 413.

COUNTY TREASURER.

The omission of the supervisors to fix the compensation of the county treasurer, as required by the act of 1846, does not deprive him of the right to compensation not exceeding the limits fixed by that

DAMAGES.

act. *Supreme Ct.*, 1870, *Supervisors of Otsego v. Hendryx*, 58 *Barb.*, 279.

COUNTER-CLAIM.

1. The provision of section 150 (subd. 2) of the Code of Procedure, allowing defendant, in any action, to set up a counter-claim, provided it be founded on a cause of action arising out of the contract or transaction set forth in the complaint, or be *connected with the subject of the action*,—is not to be construed as authorizing a defendant, sued for damages by a trespass and conversion of chattels, to set up, as a counter-claim, his damages from the facts that plaintiff, having mortgaged the chattels to defendant, secreted a part of them, and proved to have no title to another part. *N. Y. Superior Ct.*, 1871, *Chamboret v. Cagney*, *Ante*, 31.
2. The words “subject of the action,” must be construed as referring to the facts constituting the cause of action; and in this case, neither the concealment nor the failure of title is connected with the trespass, nor do they arise out of that transaction. *Ib.*

COURT.

An act creating a justice's court (2 *Laws of 1868*, p. 1522, ch. 689, § 2) does not, by force of a grant of jurisdiction in civil and criminal cases, confer power to appoint a clerk, especially when the act expressly defines other particulars, such as the qualifications, hours of service, and salary of the justice. *Supreme Ct.*, 1869, *Cassidy v. City of Brooklyn*, *Ante*, 297.

COURT COUNTY; DISTRICT COURTS OF NEW YORK; JURISDICTION; JUSTICES' COURTS; SUPREME COURT; SURROGATES' COURTS.

COURT OF APPEALS.

APPEAL; CASE; SURROGATES' COURTS, 7; TRIAL.

CRIMINAL LAW.

INDICTMENT; INSANE PERSONS; JUDGE; RAILROADS; TRIAL; WITNESS.

DAMAGES.

1. On an executory contract for the sale of property, the seller cannot recover, of the purchaser in default, the contract price, except in an action for specific performance. If he rescinds the contract, he can recover such damages only as shall compensate him for the loss of the bargain. *Brooklyn City Ct.*, 1871, *Congregation Beth Elohim v. Central Presb. Ch.*, *Ante*, 484.

DEPOSITION.

2. Upon a carrier's breach of contract to transport goods, if the owner can find another conveyance and send them accordingly, the measure of damages in his action against the carrier, is the difference between the defendant's price and that which plaintiff was compelled to pay. [8 N. Y. (4 Seld.), 340.] *Supreme Ct.*, 1870, *Grund v. Pendergast*, 58 *Barb.*, 216.
3. Of the measure of damages in an action for deceit in inducing the purchase of a bond and mortgage on property which proved to be incumbered, so that the purchaser was compelled to bid in the mortgaged property at foreclosure. *Graves v. Spier*, 58 *Barb.*, 349.

BROKER, 8.

DECEIT.

To sustain an action for deceit, not only the falsity of the representation, but defendant's knowledge of its falsity should be shown. [40 N. Y., 562.] *Supreme Ct.*, 1870, *Robinson v. Flint*, 58 *Barb.*, 100.

DEFENSES.

CORPORATION, 2; DIVORCE, 1.

DEMAND BEFORE SUIT.

1. Where an undertaking is given in pursuance of a statute, and no demand is required by the terms of the instrument, a demand before suit is not necessary; but if it were, the commencement of the action is a sufficient demand. *N. Y. Com. Pl. Sp. T.*, 1870, *Johnson v. Ackerson*, 40 *How. Pr.*, 222.
2. Demand on officers who must meet to act, may be several, and a demand of the act is a sufficient request to meet. *Supreme Ct.*, 1870, *People ex rel. Vanderlin v. Martin*, 58 *Barb.*, 286.

BROKER; COMPLAINT, 5, 11.

DEMURRER.

ACTION, 9.

DEPOSITION.

1. If testimony taken on commission is evasive or untruthful, it is proper to exclude the deposition. The rule that there should be a motion to suppress, is applicable rather to cases of defective execution of the commission. *Supreme Ct.*, 1870, *Terry v. McNeil*, 58 *Barb.*, 242.
2. To a cross-interrogatory asking if defendant or any one else had advised what interrogatories might be put, &c., witness replied, "I

DIVORCE.

have advised the defendant's counsel what I would testify to; but no interrogatory or questions were drawn or prepared that I know of, until this commission was issued; I had expected, up to about the time this commission was issued, to give my testimony in open court; I can give no further answer to this question than has already been given."—*Held*, irresponsible and evasive, and the conclusion untruthful; and that the deposition might be struck out. *Ib.*

DISCHARGE.

A discharge in insolvency, applied for and obtained in conformity with a State law, subsequently to the passage of the United States bankrupt law (*Act of Congress, March 2, 1867*), is inoperative. *Supreme Ct., 1870, Shears v. Solhinger, Ante, 287.*

IMPRISONMENT; INSOLVENT.

DISCONTINUANCE.

1. After an order has been made, requiring a husband, plaintiff in a divorce suit, to pay temporary alimony to his wife, he cannot, without complying with it, discontinue on payment of costs, by entering an *ex parte* order. *Ct. of App., 1871, Leslie v. Leslie, Ante, 64.*
2. The court of appeals refused to pass upon the terms on which leave to discontinue should be granted in such a case. *Ib.*

SUPPLEMENTARY PROCEEDINGS, 5.

DISTRICT COURTS (OF NEW YORK).

The district courts of the city of New York possess the power to compel adverse claimants of the same money or property to interplead, in a proper case. *N. Y. Com. Pl., 1871, Dreyer v. Rauch, Ante, 343.*

COSTS, 11; SUPPLEMENTARY PROCEEDINGS, 3.

DIVORCE.

1. In an action by a wife against her husband for a limited divorce, on the ground of cruel and inhuman treatment, the husband cannot interpose the plea of adultery on the wife's part as a defense. [17 Abb. Pr., 411.] *N. Y. Com. Pl., 1870, Terhune v. Terhune, 40 How. Pr., 258.*
2. An action to annul a foreign decree of divorce cannot be maintained, if the pleadings admit that both parties went within the foreign jurisdiction and appeared in the action. *Supreme Ct., 1869, Kinnier v. Kinnier, 58 Barb., 424; affirming S. C., 53 Id., 454; 3 Abb. Pr. N. S., 425; 35 How. Pr., 66.*
3. The fact that plaintiff had knowledge of the divorce suit, and that

EVIDENCE.

by the lapse of time the decree has become final and unappealable in the court where rendered, are grounds for denying relief. *Ib.*

ALIMONY.

ELECTION.

Inspectors of election cannot refuse to receive a vote on the ground that the person offering it has forfeited his citizenship by desertion from the army of the United States, unless they have evidence of the *conviction* of the alleged deserter before a competent court. The inspectors cannot adjudge his citizenship to be forfeited. *Supreme Ct. Sp. T.*, 1870, *Gotcheus v. Matheson*, 40 *How. Pr.*, 97.

ESTOPPEL.

MANDAMUS, 1; SUPPLEMENTARY PROCEEDINGS, 4.

EVIDENCE.

1. In an action to enforce the liability of members, &c., of a corporation for a corporate debt, the burden of proof is on the plaintiff to establish that the debt was contracted by the corporation. *N. Y. Superior Ct.*, 1870, *Dabney v. Stevens*, *Ante*, 39.
2. "An exemplified copy of the last will and testament of any deceased person, which shall have been admitted to probate and recorded in the office of the surrogate of any county in this State, before the first day of January, in the year one thousand eight hundred and thirty, shall be admitted in evidence, in any of the courts of this State, without the proofs and examinations taken on the probate thereof, and whether such proofs and examinations shall have been recorded or not, with like effect, as if the original of such will had been produced and proven in such court. And the recording of such will shall be deemed evidence that the same was duly admitted to probate."* *Laws of 1871*, ch. 361.
3. Stenographers' notes, how made evidence of proofs in surrogate's court. *Laws of 1871*, ch. 874.
4. Prices current contained in a file of newspapers, being published at the time of the prices referred to, for public information, are admissible to prove the market value. [4 *Wend.*, 314; 3 *Wall.*, 115.] *Supreme Ct.*, 1870, *Terry v. McNeil*, 58 *Barb.*, 242.
5. A witness having impeached the correctness of books of account, the books were *held* admissible for the purpose of contradicting him. *Ib.*
6. The books of a bank, or a statement drawn from them, are not admissible, in an action between other parties, to prove the amount of

* By the previous rule the proofs must be produced. 2 *Rev. Stat.*, 58, § 15; *Nichols v. Romaine*, 3 *Abb. Pr.*, 122.

EXECUTION.

paper discounted for one of the parties. *Supreme Ct.*, 1870, Perrine *v.* Hotchkiss, 58 *Barb.*, 77.

7. The authorities sustain the general doctrine, that a waiver of a stipulation in a contract may be shown by parol, notwithstanding the contract requires a writing. *Ct. of App.*, 1868, Carroll *v.* Charter Oak Ins. Co., *Ante*, 166.

8. Opinions of a witness are not admissible to prove the value of brokerage services, for that is fixed by statute; nor the value of a loan of credit, for credit has no market value, and compensation for a loan of it cannot be recovered in the absence of a specific agreement. *Supreme Ct.*, 1870, Perrine *v.* Hotchkiss, 58 *Barb.*, 77.

9. But they are admissible to prove the general value of time, travel and expense in obtaining a loan. *Ib.*

10. To sustain a recovery for more than nominal damages, in favor of the owner of commercial paper, against a collecting agent, for failure to give due notice of non-payment, there must be evidence that if due notice had been given, the plaintiff might have collected the amount, or some part of it. *N. Y. Com. Pl.*, 1871, Lienan *v.* Dinsmore, *Ante*, 209.

11. In an action on a note, produced by plaintiff at the trial, the presumption of his ownership is not rebutted by proof of his declarations, after maturity, that he was not the owner of it. *Supreme Ct.* 1870, Springer *v.* Dwyer, 58 *Barb.*, 189.

12. Mere delay of a creditor in entering judgment or issuing execution, is not sufficient evidence of collusion with the debtor. *Supreme Ct.*, 1871, Devoe *v.* Brandt, 58 *Barb.*, 493.

13. In an action to enjoin injury to a watercourse, and for damages, evidence how much less plaintiff's mill produced than it could have produced had the water not been detained, and the profit on such products, is incompetent, for it is mere matter of speculative opinion whether the additional amount could have been made, &c. [16 N. Y., 489.] *Supreme Ct.*, 1870, Pollitt *v.* Long, 58 *Barb.*, 20.

CONTRACTS, 3, 4; DEPOSITION; MALICIOUS PROSECUTION; WILL; WITNESS.

EXECUTION.

“Executions issued by the county clerks of the several counties of this State, between the twelfth day of May, in the year one thousand eight hundred and sixty-nine, and the sixth day of May, in the year one thousand eight hundred and seventy, on judgments of justices of the peace, docketed in their respective offices, and the issuing of all such executions, and the sales of property on all such executions, are hereby made and declared lega. and valid; but nothing herein contained shall affect any action or proceeding now pending to set

GOOD WILL.

aside, or have declared void, any such execution or sale." *Laws of 1871*, ch. 610.

INSOLVENT; SUPPLEMENTARY PROCEEDINGS, 3.

EXECUTORS AND ADMINISTRATORS.

1. Under the statute (2 *Rev. Stat.*, 96), claims not yet due may be presented to the executors, &c. *Supreme Ct.*, 1871, Hoyt *v.* Bonnett, 58 *Barb.*, 529.
2. A refusal, "as at present advised," to pay a claim, coupled with a request for a bill of particulars and vouchers, is a rejection of the claim, within the meaning of the statute. *Ib.*

NOTICE, 1.

FORECLOSURE.

1. The act (2 *Laws of 1867*, p. 1690, ch. 658) as to paying over surplus to surrogate,—amended by excepting cases where letters issued four years before the sale. *Laws of 1871*, ch. 834.
2. In an ordinary action for foreclosure and sale of mortgaged premises, the usual decree for that purpose is final, so far as to be appealable to the court of appeals, without awaiting the order confirming the report of the sale. *Ct. of App.*, 1870, Bolles *v.* Duff, *Ante*, 399.

FORCIBLE ENTRY AND DETAINER.

A relator held not entitled to succeed by setting up the title of the State, or of any one else, in hostility to that under which he or his grantors held. *People ex rel. Cooper v. Field*, 58 *Barb.*, 270.

FORFEITURE.

CORPORATION, 4.

FORMER ADJUDICATION.

INSOLVENT, 3; JUDGMENT, 4.

FRAUD.

The question, what circumstances make out a charge of fraud against a merchant in buying goods on credit, examined. *Brown v. Ashbough*, 40 *How. Pr.*, 226.

GOOD WILL.

The good will of a business firm is regarded in equity as a part of the assets; and, after dissolution, a partner may be enjoined from ap-

INJUNCTION.

propriating it to the exclusion of the other partners. *Supreme Ct. Sp. T.*, 1870, Bining *v.* Clark, *Ante*, 264.

GUARDIAN AND WARD.

Personal service on the father, of notice of an application to the surrogate for appointment of a guardian of a minor whose father is living, required at least ten days prior to the application. *Laws of 1871*, ch. 708, amending 2 *Rev. Stat.*, 151, § 6.

HABEAS CORPUS.

IMPRISONMENT, 4.

HUSBAND AND WIFE.

The intention of the married women statutes was to encourage and protect those unhappy in their marital relations. Though the husband may act as her agent, he may not be her unpaid servant while defrauding his creditors. *Brooklyn City Ct.*, 1871, O'Leary *v.* Waller, *Ante*, 439.

IMPRISONMENT.

1. Proceedings in a county court, under 2 *Rev. Stat.*, 31 (in relation to a debtor's discharge from imprisonment on his making an assignment), must be had at a *regular* term of the court. Where the regular term adjourned without day, pending the proceedings, subsequent proceedings had before the county judge are without jurisdiction. Although the judge may decide a matter in court after the adjournment of the term, the order must be entered as of the term when the matter was submitted. *Supreme Ct.*, 1869, *People ex rel. Galsten v. Brooks*, 40 *How. Pr.*, 165.
2. In proceedings under 2 *Rev. Stat.*, 31, the account of the estate of the person imprisoned must contain all the statements required by the statute; otherwise it is ineffectual to discharge the imprisoned person. *Ib.*
3. A discharge refused because the debtor had taken voluntary proceedings in bankruptcy. *Ib.*
4. A person indicted, who is held by a sheriff on civil process, may be taken out of the sheriff's custody by *habeas corpus*. The order of the court in which the indictment is pending, is a protection to the sheriff. *Laws of 1871*, ch. 208.

CERTIORARI, 1.

INJUNCTION.

1. A perpetual injunction is the proper remedy for the use of a

INJUNCTION.

stream by defendant in a manner sensibly injurious to the rights of an adjoining owner. [40 N. Y., 191.] *Supreme Ct.*, 1870, *Pollitt v. Long*, 58 *Barb.*, 20.

2. An artist who has designed and painted a picture, and his assignee of the exclusive right to reproduce copies by any other means than in oil painting, may have an injunction to restrain a third person from making and selling copies without license. [2 *De Gex & S.*, 652; 10 *Ir. Ch.*, 510.] *Supreme Ct. Sp. T.*, 1870, *Oertel v. Wood*, 40 *How. Pr.*, 10.

3. A preliminary injunction will not issue to restrain an owner of land from making an improvement, merely because such improvement will make less convenient a right of way, reserved to plaintiff only in general terms, and securing access without specifying the track. *Supreme Ct. (Sp. T.)*, 1870 ?, *Shaver v. Cohn*, 40 *How. Pr.*, 129.

4. As a defendant can now, as a general rule, interpose any defense he may have, whether legal or equitable, and thus obtain, by answer, motion or otherwise, all the relief, in the original suit, to which he would be entitled if he brought a separate action, it is neither necessary nor allowable to bring an action, nor will an injunction be granted, merely for the purpose of restraining the proceedings in another action, both being in the same court. *N. Y. Com. Pl.*, 1870, *Carpenter v. Keating*, *Ante*, 223.

5. Where such an injunction was granted, but no bond was given or money deposited, as required by 3 *Rev. Stat.*, 5 ed., 270,—*Held*, on appeal, that even if the plaintiff had been entitled to the relief he sought, the failure to comply with the statute was fatal to the order of injunction appealed from. *Ib.*

6. Where defendant was prosecuting a proceeding in the surrogate's court, and also another in the supreme court, contrary to the terms of a compromise and release, which, however, she claimed was obtained from her by fraud;—*Held*, that an action might be maintained for an injunction restraining the prosecution of either proceeding until the determination of the question of fraud in such action. *Supreme Ct. Sp. T.*, 1869, *Sampson v. Wood*, *Ante, note*, 223.

7. An injunction lies at the suit of the owner of a peculiar product of nature, to protect him in the exclusive use of a name belonging to it alone, and employed by him as his trademark in the sale thereof. *Ct. of App.*, 1871, *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, *Ante*, 348.

8. Under the acts requiring license for dramatic entertainments in the city of New York (*Laws of 1839*, p. 11; *Laws of 1860*, p. 999; *Laws of 1862*, p. 475), an injunction lies to restrain *impromptu* character-

INSANE PERSONS.

izations, if performed on successive nights in a public hall, for admission to which a price is charged. *Supreme Ct. Sp. T.*, 1871, Society for Reformation of Juvenile Delinquents *v.* Diers, *Ante*, 216.

9. Abraham Bininger Clark, who had been a partner in the firm of A. Bininger & Co., usually writing his name Abm. B. Clark, continued a similar business on his own account, after dissolution of that firm, and put up his name as A. Bininger Clark, successor of A. Bininger & Co.;—*Held*, that he might be restrained by injunction from the use of such a style. *Supreme Ct. Sp. T.*, 1870, Bininger *v.* Clark, *Ante*, 264.

10. The rule is well settled that a tax-payer, as a general rule, cannot maintain an injunction suit to restrain the collection of an alleged illegal tax, especially where he has a perfect remedy at law. The court, in the proper exercise of its equity powers, does not review and correct the errors of subordinate tribunals. *Supreme Ct. Sp. T.*, 1868, Thurston *v.* City of Elmira, *Ante*, 119.

11. On a motion to dissolve an injunction, the plaintiff may read new affidavits in answer to any new matter, set up as explanatory, or in the nature of confession and avoidance, in the defendant's affidavits. *Supreme Ct. Sp. T.*, 1871, Society for the Reformation of Juvenile Delinquents *v.* Diers, *Ante*, 216.

INDICTMENT.

Form of indictment of driver and conductor on city railroad car, for overdriving and overloading, &c., horses, in violation of the statute against cruelty to animals. *People v. Tinsdale*, *Ante*, 374.

INSANE PERSONS.

1. Weakness of mind arising from age is not unsoundness, within the meaning of the statute, allowing appointment of committee. [7 Paige, 236; 4 Russ., 187; 3 Edw. Ch., 380.] *Herkimer Co. Ct.*, 1870, Matter of Shaul, 40 *How. Pr.*, 204.

2. “The court of oyer and terminer, in which any indictment may be pending against any person for any offense the punishment of which is death, shall have power, with the concurrence of the presiding judge of such court, summarily to inquire into the sanity of such person, and the degree of mental capacity possessed by him, and for that purpose may appoint a commission to examine such person and inquire into the facts of his case, and report thereon to the court; and if the said court shall find such person insane or not of sufficient mental capacity to undertake his defense, they may by order remand such person to such lunatic or other asylum as, in their judgment, shall be meet, subject as to the future disposition of the person to all the provisions of chapter twenty, part first, article second, title third of the Revised Statutes.” *Laws of 1871*, ch. 666, § 1.

INSURANCE.

3. "The governor shall possess the same powers conferred upon courts of oyer and terminer in the case of persons confined under conviction for offenses for which the punishment is death." *Id.*, § 2.

INSOLVENT.

1. In an application for a discharge from execution against the person (under 2 *Rev. Stat.*, ch. 5, art. 6, tit. 1, § 1), the debtor need not be held to the most perfect recollection, at the time of making up his schedule, of every minute claim, debt, or item of property owned by him. *N. Y. Com. Pl. Sp. T.*, 1871, Matter of Rosenberg, *Ante*, 450.
2. If, on his examination, he remembers those particulars, the court will allow him to amend his petition on the hearing, if satisfied that the omission was not intentional or fraudulent. *Ib.*
3. If he do not ask leave to amend, and an order denying the application is entered, he must get rid of the order before there can be any proceeding to amend. The order denying the application is the end and proper termination of the proceeding. *Ib.*
4. The court requires jurisdiction of the application only when the person, imprisoned for over five hundred dollars, presents his petition after he has been imprisoned for three months; and these facts must appear in the petition. *Ib.*
5. Objection to the jurisdiction may be taken as well on a motion to re-hear, as upon the original hearing. *Ib.*
6. When the petition of an imprisoned debtor, for a discharge from execution under 2 *Rev. Stat.*, 31, has been refused because his proceedings are adjudged to be not just and fair, in that he failed to include, in his petition and account, property which he had when he was imprisoned, or when his accounts were made up, and part of which he disposed of after his imprisonment, a new petition cannot be presented stating facts explaining or justifying his acts on the former proceedings. *N. Y. Com. Pl. Sp. T.*, 1871, Matter of Thomas, *Ante*, 114.
7. That is not properly new matter, but matter which was in his knowledge during the former trial, and which he might then have urged. *Ib.*
8. Such a second petition must be dismissed, and the petitioner left to an application to reopen the former proceeding upon proof of good faith in the matters charged upon him in it. *Ib.*

IMPRISONMENT.

INSURANCE.

1. Notwithstanding a provision in the policy, that no condition can be

JUDGE.

waived, except in writing signed by the secretary, a condition may be waived by parol, by the general agent acting within the scope of his agency, especially where the act can be regarded as ratified by the company. *Ct. of App.*, 1868, *Carroll v. Charter Oak Ins. Co.*, *Ante*, 166.

2. The condition of an insurance policy, requiring timely service of preliminary proofs of loss, cannot be dispensed with by the court, upon excuse or impossibility shown; but acts of the officers, in examining the facts and assenting to delay on account of the absence of the owner, and in keeping the proofs some days when served after the time has expired, and determining to contest the claim on other grounds, are a waiver of the condition. *Supreme Ct.*, 1869, *Owen v. Farmers' Joint Stock Ins. Co.*, *Ante*, 166.
3. Where the facts as to the incumbrances were in the knowledge of the insurers' agent who induced the insured to take out a policy, the representation that there were no incumbrances may be regarded as not intended to deny the existence of judgments against the insured, which were a mere general lien on the premises in common with his other real property. *Ib.*

INTERPLEADER.

1. Section 122 of the Code of Procedure, as amended in 1849, giving the right of interpleader, is applicable to actions in the inferior as well as in the higher courts. *N. Y. Com. Pl.*, 1871, *Dreyer v. Rauch*, *Ante*, 343.
2. *It seems*, that the affidavit upon which the order of interpleader is based, need not assert ignorance on the part of the defendant of the rights of the respective claimants, but is sufficient if it shows: 1. The existence of an action on contract. 2. Claim of the money or debt involved, by one not a party to the action. 3. Absence of collusion. 4. Indifference to the claims of the contestants. 5. Want of interest in or claim upon the money involved. *Ib.*

JOINDER OF ACTIONS.

COMPLAINT 15.

JUDGE.

1. A justice who, in criminal case in which he has jurisdiction, imposes and collects a fine grossly larger than the statute allows, is not liable in an action to recover it back. This is an error in the measure or degree of the exercise of jurisdiction, and the principle of judicial irresponsibility protects him. *Supreme Ct.*, 1870, *Clark v. Holdridge*, 58 *Barb.* 61; *S. C.*, less fully, 40 *How. Pr.*, 320.

JURISDICTION.

2. For the same reason he can not be regarded as having received the money in an extra-judicial capacity, so as to sustain an action for money received,—especially after he has paid it over to the county treasury, and when he acted in good faith. *Ib.*

JUDGMENT.

1. State courts are not bound by the rule laid down in *7 Wallace*, as to the form of judgment, in actions on contracts payable in coin; but judgment may be expressed in currency. *Supreme Ct.*, 1870, *Grund v. Pendergast*, 58 *Barb.*, 216.
2. A judgment creditor, who, without notice, advances money upon the faith of the unincumbered record title to land of the borrower confessing judgment to him to secure the same, is entitled to the lien acquired by the judgment in preference to a secret unrecorded lien of the latter's vendor, for a part of the purchase money. Such a judgment creditor is to be regarded as a *quasi* purchaser. *Supreme Ct.*, 1870, *Hulett v. Whipple*, 58 *Barb.*, 224.
3. In an action brought to have an assignment of a lease, absolute on its face, declared a mortgage, a judgment so declaring it, but ordering the complaint dismissed within a certain time, if redemption be not made, is not a foreclosure of the mortgage until the final order so dismissing the complaint is obtained; and the plaintiff may apply to the court to extend the time limited for redeeming. *Ct. of App.*, 1870, *Bolles v. Duff*, *Ante*, 399.
4. Such judgment is not a bar to an action brought against the assignee by a receiver appointed at the instance of judgment creditors of the assignor, to secure the benefit of the judgment, even though the premises are not redeemed within the time limited. *Ib.*

ACTION, 3; APPEAL, 13-18; DIVORCE, 1; FORECLOSURE; MECHANIC'S LIEN, 4.

JUDICIAL SALE.

PARTITION.

JURISDICTION.

1. The courts of this State have jurisdiction, in an action brought here between parties resident in other States, to order the arrest of the defendant for fraud in contracting the debt, &c., if he be found within this State, although by the law of the place of his residence he could not be arrested there for the same cause. *Supreme Ct.*, 1871, *Johnson v. Whitman*, *Ante*, 111.
2. An action against one State, in the courts of another, cannot be sus-

JUSTICES' COURTS.

tained by joining, with the State sued, one of its officers, against whom no cause of action exists and no judgment can be had, in order to attach money of the State, on deposit within the jurisdiction of the court, and thereby coerce its appearance. *Supreme Ct. Sp. T.*, 1871, Stockwell *v.* Bates, *Ante*, 381.

INSOLVENT, 4, 5; **JUDGE**; **MECHANIC'S LIEN**, 5; **SERVICE** (and proof of), 3, 5; **TAXES**.

JURY.

1. "Whenever any circuit court, or court of oyer and terminer shall be satisfied that the public interest requires the attendance at such court, or at any adjourned term thereof, of a greater number of petit jurors than is now required to be drawn and summoned for such court, then said court may, by order entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of petit jurors as it shall deem necessary, which number shall be specified in said order.† The clerk of the county in which such court is held shall forthwith bring into *said* court the box containing the names of the petit jurors, from which jurors from said county is required to be drawn, and the said clerk shall, in the presence of said court, proceed publicly to draw the number of jurors specified in *said* order of *such* court, and when such drawing is complete, the said clerk shall make two lists of the persons so drawn, each of which shall be certified by him to be a correct list of the names of the persons so drawn by him, one of which he shall file in his office, and the other he shall deliver to the sheriff. The sheriff shall thereupon immediately proceed to summon the persons mentioned in such list to appear in the court in which the order requiring the attendance of such jurors shall have been made, on the day designated in *such order*,‡ and the persons so summoned shall appear in obedience to such summons, and all the provisions of law relating to the summoning and the swearing in of jurors, and their punishment for non-attendance, not inconsistent with this act, shall apply to the swearing in, summoning and punishment of the jurors drawn and summoned under this act." *Laws of 1871*, ch. 16, amending* 1 *Laws of 1870*, ch. 409, p. 952.

2. A verdict is not rendered irregular by the fact that, notwithstanding the act of 1870, an additional panel of jurors were drawn under the act of 1861. The act of 1870 is not mandatory or exclusive. *Supreme Ct. Sp. T.*, 1870, Bennett *v.* Matthews, 40 *How. Pr.*, 428.

TRIAL, 1.

JUSTICES' COURTS.

1. When, on appeal from a justice's judgment, a new trial is had in the county court, and the county court erroneously orders defendant's

* The words "not exceeding thirty-six," were omitted at the † by the amendment; and the words "which day shall not be less than two days from the date of the entry of such order," at the ‡. Other amendments are indicated in italics.

LUNATICS.

exceptions taken on the trial therein, to be heard at the general term of the *supreme* court, plaintiff is not entitled to costs on the mere dismissal of the whole case by the general term of the supreme court, for want of jurisdiction; although he would be entitled to costs, should the decision of a court of competent jurisdiction be in his favor. *Supreme Ct.*, 1870, *Humiston v. Ballard*, 40 *How. Pr.*, 40; modifying *S. C.*, below, 39 *Id.*, 93.

2. The Code (§ 371) allowing costs to the appellant, on appeal from a justice's judgment, "provided however that the appellant shall not recover costs, unless the judgment appealed from be reversed on such appeal, or be made more favorable to him, to the amount of at least \$10," does not authorize the allowance of interest on the former judgment, in estimating the difference between that and the latter judgment, in deciding whether the amount is \$10 more favorable to the appellant; but the difference must be that between the original judgment at the *time* the party appealed from it, and the final judgment. *Ib.*

EXECUTION.

JUSTICES OF THE PEACE.

The provisions of 1 *Laws of 1870*, p. 981, ch. 432, for the audit of the bills of justices for services in criminal cases,—amended by allowing an appeal to the supervisors. *Laws of 1871*, ch. 274.

LIMITATIONS OF ACTIONS.

1. Where a servant, in the course of his employment, commits an assault and battery, an action for damages therefor, though brought only against his employer, is an action for assault and battery, and therefore barred in two years, by section 93 of the Code of Procedure. *N. Y. Superior Ct.*, 1870, *Priest v. Hudson River R. R. Co.*, *Ante*, 60.
2. Where a brakeman employed by a railroad company assaulted the plaintiff by striking him, throwing him down, trampling on him, &c., as alleged in the complaint,—*Held*, that the action against the company was for assault and battery. *Ib.*
3. The old action of trespass discussed and explained. *Ib.*
4. Action against a sheriff on a liability incurred by the doing of an act in official capacity, and in virtue of his office, or by the omission of an official duty, not including the payment of money collected upon an execution, must be brought in one year from the time the cause accrued. *Laws of 1871*, ch. 733.

CORPORATIONS, 3.

LUNATICS.

INSANE PERSONS.

MEASURE OF DAMAGES.

MALICIOUS PROSECUTIONS.

To make out probable cause as a defense to an action for malicious prosecution, defendant must show that he acted fairly, prudently, cautiously, and reasonably, as well as in good faith. [6 Barb., 83; 52 Maine, 505.] *Supreme Ct.*, 1870, Shafer *v.* Loucks, 58 *Barb.*, 426.

MANDAMUS.

One having a claim against a county does not, by receiving the part the supervisors allow upon auditing it, estop himself from compelling them by mandamus to re-adjust the claim and allow the residue. *Supreme Ct.*, *Sp. T.*, 1870, People *ex rel.* Kinney *v.* Supervisors of Cortland, 40 *How. Pr.*, 53.

MANUFACTURING CORPORATION.

1. Where neither the president nor the secretary of a manufacturing company, nor both combined, possessed the power to issue drafts or to negotiate drafts drawn by them in the name of the company, the company are not liable on such drafts, except on proof:
 1. That a general or particular authority was conferred on them, or either of them, by the board of trustees; or,
 2. That the conduct of the company was such as to create a well founded belief, that such authority had been delegated; or,
 3. That the acts, although unauthorized, were subsequently ratified by the board. *N. Y. Superior Ct.*, 1870, Dabney *v.* Stevens, *Ante*, 39.
2. Such delegation of authority or subsequent ratification may be either expressed or implied. *Ib.*
3. But a subsequent ratification will not be inferred, in the absence of proof that the board had notice of the unauthorized acts. *Ib.*
4. The liability imposed by statute upon trustees of manufacturing companies for neglecting to file an annual report, is in the nature of a penalty for misconduct in office. The penalty imposed is the debt of the corporation. *Ib.*

ACTION, 1.

MARSHAL.

SUPPLEMENTARY PROCEEDINGS, 3.

MEASURE OF DAMAGES.

DAMAGES.

MOTIONS AND ORDERS.

MECHANICS' LIENS.

1. Pending a reference of an action to foreclose a mechanic's lien, the court cannot properly discharge the lien upon a summary application on affidavits as to the merits. *N. Y. Superior Ct.*, 1871, McGuckin *v.* Coulter, *Ante*, 128.
2. An owner moving to have a lien discharged, upon the ground that it has not been continued, though a year has elapsed, must aver in his affidavit facts showing this to be the case. A general allegation is insufficient. *Ib.*
3. If it appear that an order continuing the lien was filed, the making of a new docket will be presumed. *Ib.*
4. In an action to foreclose a mechanic's lien, if the judgment be not perfected within one year from the commencement of the lien, and the lien is allowed to expire, the plaintiff must be nonsuited *with costs*. *Supreme Ct. Sp. T.*, 1870, Huxford *v.* Bogardus, 40 *How. Pr.*, 94.
5. The court has jurisdiction to award costs to the defendant in such case, although possibly, upon good cause shown, the court might allow a plaintiff in certain circumstances to discontinue without costs; as in case of a discharge in bankruptcy after the commencement of the action, and the like. *I*

MISTAK.

AMENDMENT.

ONEY RECEIVED.

ACTION, 10.

MOTIONS AND ORDERS.

Where the plaintiff received motion papers for a motion to compel him to elect one of several causes of action and to strike out the residue from his complaint, and subsequently, but on the same day, served an amended complaint,—*Held*, that the notice given was a "proceeding had" within section 172 of the Code; that the amended complaint did not supersede the motion, and that he must pay the costs of the motion. *Supreme Ct. Sp. T.*, 1870, Prudden *v.* City of Lockport, 40 *How. Pr.*, 46.

APPEAL; CONTEMPT; INJUNCTION, 11; NOTICE, 1; SERVICE (and proof of).

NEW YORK (CITY OF).

MUNICIPAL CORPORATIONS.

1. Under the Town Bonding Act of 1869 (*2 Laws of 1869*, p. 2303, ch. 907, amended by *1 Laws of 1870*, p. 450, ch. 173; *2 Id.*, p. 1148, ch. 507), all names upon the tax roll must be counted, including those of persons only taxed for dogs, in ascertaining if the petitioners are a majority in number of the tax-payers. *Supreme Ct.*, 1871, *People ex rel. Longwell v. McMaster*, *Ante*, 132 (superseded on this point by the amendatory act of 1871).
2. The appearance before the county judge, under § 2, of tax-payers who desire to join in the petition, must be an appearance in person. *Ib.*
3. The implied contract which is deemed to arise out of the acceptance of a charter by a municipal corporation, is a contract between the city and the State, and not between the city and individuals; and is not "impaired" by a statute exempting from liability for torts. *Ct. of App.*, 1869, *Gray v. City of Brooklyn*, *Ante*, 186.
4. The proceedings of a municipal corporation will not be held invalid because one of the commissioners making local assessments for paving was not a freeholder, or because the work was given to a contractor without exacting a bond. *Supreme Ct. Sp. T.*, 1868, *Thurston v. City of Elmira*, *Ante*, 119.

ASSESSMENT; BOARD OF HEALTH; BROOKLYN; NEW YORK.

NEW YORK (CITY OF).

1. Under the act of 1870 (*Laws of 1870*, ch. 383, § 27), the omission to advertise for bids or sealed proposals for cross-walks to be laid, although embraced within the resolution of the common council, is not necessarily fatal to the assessment, for the excess may be deducted; though it would have been fatal under the act of 1858. *Supreme Ct.*, 1870, *Matter of McCormack*, *Ante*, 234.
2. An objection that in paving a street, the space between the rails of a railroad company was not paved, relates to an omission of which petitioners to vacate the assessment cannot complain, since it lessens the amount of the assessment; and the omission is not a legal irregularity. *Ib.*
3. The selection by the common council of a patented pavement is not a legal irregularity. *Ib.*
4. An excessive charge for expenses will not be fatal to an assessment, but may be corrected by the court. *Ib.*
5. The principle on which the assessment is made cannot be reviewed by proceedings under the act of 1858. *Ib.*
6. An assessment for laying cross-walks of stone, where stone cross

OYER AND TERMINER.

walks are not laid, and none others authorized, is an irregularity. *Supreme Ct.*, 1871, *Matter of Eager, Ante*, 229.

7. No authority is given by the statute to include an allowance to the contractor for extra compensation for doing the work before the time fixed by the contract. *Ib.*

8. An assessment in the city of New York will not be set aside for legal irregularity, on the ground that the work was done in contravention of a statute enacted after the contractors' bids for the work were opened and the lowest duly made accepted, though before the contract was executed. *Supreme Ct. Sp. T.*, 1870, *Matter of Episc. Pub. School*, 40 *How. Pr.*, 139.

9. The acceptance of the lowest bid duly made under the charter of 1857, vests a right in the contractor; and a subsequent statute regulating local improvements, in the absence of an express provision to the contrary, is to be construed as inapplicable to any improvement already thus contracted for. *Ib.*

10. An assessment should not be vacated for including an unlawful charge, but, under the act of 1870, may be modified by deducting it. *Supreme Ct. Sp. T.*, 1870, *Matter of Wilks, Ante*, 234.

11. The act of 1870, ch. 383, in regard to assessments for the repaving of streets in New York, has no retroactive effect. *Supreme Ct.*, 1871, *Matter of Eager, Ante*, 229.

NOTICE.

1. An executors' notice need not specify their residence as the place for presenting claims. They may select a place for the purpose, and by specifying it in the notice, make it their place of business or residence for that purpose. [Overruling 9 *Bosw.*, 689.] *Supreme Ct.*, 1871, *Hoyt v. Bonnett*, 58 *Barb.*, 529.

2. Actual notice of a decision overruling a preliminary objection to an order to show cause, and requiring the party to appear on a further day named, is a sufficient notice to appear then, although no formal order be made and served. *N. Y. Com. Pl.*, 1869, *Baker v. Stephens, Ante*, 1.

NOTICE OF TRIAL.

Noticing a cause for trial admits that it is in readiness, as to the parties to the notice. *Supreme Ct.*, 1871, *Oneida National Bank v. Stokes, 58 Barb.*, 508.

OYER AND TERMINER.

INSANE PERSONS; JURY.

PARTIES.

PARTIES.

1. A. went to B.'s factory and selected and ordered a log to use on a certain job, saying, "I will send a man for it;" but afterwards relinquished the job, and told C., who had undertaken the same job, that he could get such a log as he wanted at B.'s; and C. went to B.'s factory, saying, "I want the log A. selected," and upon that request obtained and used it for his own benefit. *Held*, that A. was liable to B. for the use of the log. *N. Y. Com. Pl.*, 1870, *Ripley v. Cochran, Ante*, 52.
2. A collecting agent delivered a package of money to an express company addressed to his principals, but they could not be found. *Held*, that the agent might recover the package or its value from the company. Either principal or agent might maintain an action, and a recovery by one would bar the other. [7 *Cow.*, 328; 12 *N. Y.*, 343.] *Supreme Ct.*, 1871, *Thompson v. Fargo*, 58 *Barb.*, 575.
3. A draft upon a savings bank cannot operate as an assignment of moneys not deposited till after the draft was drawn. When applicable to such funds, it is a mere authority or direction to the bank. *Ct. of App.*, 1871, *Fordred v. Seaman's Savings Bank, Ante*, 425.
4. Such a draft, no interest being proved by the payee, is revocable, and, upon the death of the drawer, is revoked. *Ib.*
5. Hence, the proper party to sue in such a case is the executor or administrator of the depositor. *Ib.*
6. Upon a policy issued to A., but loss, if any, "payable to B. & Co., and C., as their interest shall appear," the insured may maintain an action in his own name without joining the others; and proof on the trial that the others claim an interest will not defeat the action, if it does not appear that they asserted their claim against the insurers. *Ct. of App.*, 1868, *Owen v. Farmers' Ins. Co., Ante*, 166.
7. An action on a policy of insurance covering real property, for a loss after the death of the insured, is properly brought, if maintainable at all, in the name of the administrator—the policy running to the assured, his executors, administrators, &c., although the recovery is for the benefit of the successors in the title. [26 *N. Y.*, 253.] *Supreme Ct.*, 1870, *Lappin v. Charter Oak Ins. Co.*, 58 *Barb.*, 325.
8. An action to recover pilotage, where the pilot's services were refused, may be brought by the pilot in his own name. *N. Y. Com. Pl.*, 1871, *Wilson v. Mills, Ante*, 143.
9. Where an assignee for the benefit of creditors collusively refuses to enforce rights vested in him as trustee for their benefit, a receiver of the debtor's property, appointed at the instance of creditors,

PILOTS.

may maintain an action in his stead, and the court may direct the property so reached to be distributed according to the provisions of the assignment. *Ct. of App.*, 1870, *Bolles v. Duff, Ante*, 399.

10. Even after a receiver of partnership property has been appointed, or an assignment in bankruptcy has been made by a firm, one of the partners may bring an action to restrain another from a wrongful attempt to appropriate the good will and name of the former firm; for he has an interest in protecting the property so that his debts may be discharged and leave a surplus possible. *Supreme Ct. Sp. T.*, 1870, *Bininger v. Clark, Ante*, 264.
11. One who participated as a party to fraudulent assignments,—*Held*, a proper defendant in an action to set them aside. *Bennett v. McGuire*, 58 *Barb.*, 625.
12. Equity will not interpose to charge the representatives of a deceased joint debtor, upon the insolvency of the survivor, where it does not appear that the instrument was made a joint contract by mistake, instead of a several one, nor where it appears that the deceased was merely a surety. *Supreme Ct. Sp. T.*, 1870, *Hulbert v. Ferguson*, 40 *How. Pr.*, 474.

RAILROADS; SERVICE (and proof of).

PARTITION.

If the referee in partition disregards the directions of the decree to pay off liens, and sells subject to all liens, the sale should be set aside, for this course alarms bidders. *Supreme Ct.*, 1870, *Hobart v. Hobart*, 58 *Barb.*, 296.

PARTNERSHIP.

The rule that an action by one partner against another does not lie until a balance struck and promise to pay,—*Held*, not applicable to an action to recover back money contributed towards forming an association which was not carried out. *Supreme Ct.*, 1870, *Churchill v. Stone*, 58 *Barb.*, 233.

ACTION, 2, 3; GOOD WILL; INJUNCTION, 9.

PAYMENT INTO COURT.

Where the complaint demands payment *in gold*, an answer of willingness to pay the claim *in currency* is no defense, without a tender of the money and bringing it into court. *Supreme Ct. Sp. T.*, 1870, *Bronson v. Rock Island R. R. Co.*, 40 *How. Pr.*, 48.

PILOTS.

1. Notwithstanding the United States pilotage act (*Act of Congress*

PRECEPT.

of July 25, 1866), sea-going vessels in the harbor of New York are subject to pilotage under the State law. *N. Y. Com. Pl.*, 1871, Henderson *v.* Spofford, *Ante*, 140.

2. The amendment to the act of 1866, passed February 25, 1867, is a reconcession, to the States, of the powers as exercised by them through laws existing at the time of the passage of the original act. *Ib.*
3. Under the New York pilotage laws (1 *Laws* of 1857, p. 500, ch. 243, and the regulations of the commissioners of pilots, a pilot offering services which are refused may recover, notwithstanding the offer and refusal were beyond the territorial jurisdiction of the State. *N. Y. Com. Pl.*, 1871, Wilson *v.* Mills, *Ante*, 143.
4. The case of Peterson *v.* Walsh, 1 *Daly*, 182, overruled. *Ib.*
5. To the pilot's offer of services, the master replied that they wanted a pilot when they reached pilot ground, but kept on his course, and entered port without a pilot.—*Held*, that this was a sufficient refusal to sustain an action. *Ib.*

PLEADING.

1. In an action on the covenant to pay rent, contained in a sealed lease, an answer that plaintiffs were not the owners of the premises they assumed to demise, and defendants never had possession, is not sufficient, unless fraud is alleged. [15 N. Y., 374.] *Supreme Ct.*, 1871, Bigler *v.* Furman, 58 *Barb.*, 545.

BAIL; COMPLAINT; COUNTER-CLAIM.

2. In an action on a railroad bond, payable to bearer, in plaintiff's possession, an answer denying,—1, delivery to plaintiff; 2, any knowledge or information sufficient to form a belief that plaintiff is the owner, &c.; 3, presentment and demand of payment; and averring, 4, the amount claimed due to be erroneous,—is frivolous. *Supreme Ct. Sp. T.*, 1870, Bronson *v.* Rock Island R. R. Co., 40 *How. Pr.*, 48.

PRECEPT.

1. *It seems*, that a precept to commit for contempt of an order "to pay a sum of money" need not, *in terms*, admit the prisoner to the jail limits, but is sufficient if it recites the order for the payment of money, and contains a command to the sheriff to commit the person to prison. It is then a question between the prisoner and the sheriff, whether the former shall be allowed to go upon the limits of the prison. *Ford v. Ford*, *Ante*, 74.
2. The case of Ward *v.* Ward, 6 *Abb. Pr. N. S.*, 79, disapproved. *Ib.*

RECEIVER.

PROBABLE CAUSE.

MALICIOUS PROSECUTION.

QUARANTINE.

Police, and jurisdiction of offenses respecting quarantine. *Laws of 1871*, ch. 715.

QUESTIONS OF LAW AND FACT.

1. Questions of negligence on disputed facts are questions for the jury, and this is so where one of the defenses founded on negligence, is the neglect of the plaintiff, in not applying the proper remedies for the injuries sustained. *Supreme Ct.*, 1870, *Maloy v. N. Y. Central R. R. Co.*, 40 *How. Pr.*, 274.
2. It is the duty of the plaintiff to take proper care after the injury, but what is proper care and treatment is a question for the jury. *Ib.*

TRIAL, 6, 7, 12.

RAILROADS.

1. The driver and conductor of a city railroad car are not exempted from liability under the act to prevent cruelty to animals, because, at the time of the commission of the offense, they were in the employ of the railroad company, or were acting under its orders. *N. Y. Gen. Sess.*, 1868, *People v. Tinsdale*, *Ante*, 374.
2. The commission of the offense under the statute does not rest upon the question of *intent*. The intent is assumed from the act itself. *Ib.*
3. The conductor of an overloaded car is equally responsible with the driver for the violation of the statute; indeed, more so, as the driver is usually subject to the orders of the conductor. *Ib.*
4. The law does not limit the number of passengers to be carried. Whether a car was or was not overloaded, is a question of fact, upon all the evidence, for the jury to determine. *Ib.*

MUNICIPAL CORPORATIONS.

RATIFICATION.

MANUFACTURING CORPORATIONS.

RECEIVER.

1. A plaintiff may have a receiver appointed before trial, even when other receivers of the same funds have previously been appointed by other courts in separate actions. But the latter appointment must

REFERENCE.

be subject to the exercise of the powers of the previously appointed receiver, or any other prior judicial authority under which the funds in controversy are held. *N. Y. Superior Ct.*, 1871, *Bailey v. Belmont*, *Ante*, 270.

2. A receiver is not deemed a *bona fide* holder of a note transferred to him as receiver, within the rule as to negotiable paper. *Supreme Ct.*, 1870, *Briggs v. Merrill*, 58 *Barb.*, 389.

REDEMPTION.

JUDGMENT, 4.

REFERENCE.

1. Any notice distinctly giving the opposite party information that the party serving the notice has elected to end the reference for the delay in reporting, is sufficient. *Ct. of App.*, 1870, *Gregory v. Cryder*, *Ante*, 289.
2. After notice of election to end a reference, under § 273 of the Code of Procedure, all subsequent proceedings by or before the referee, are a nullity. *Ib.*
3. The court has no power to render such proceedings valid by an order enlarging the time for delivering the report, or otherwise. *Ib.*
4. The omission of counsel to furnish to the referee necessary papers used on the trial, until after the final submission of the cause, does not prevent the running of the time limited for making the decision. *Ib.*
5. A judgment ordered by a referee without taking an account, in a case where an account is necessary, may be set aside *on motion*, and a rehearing ordered. *Supreme Ct. Sp. T.*, 1870, *Bouton v. Bouton*, 40 *How. Pr.*, 217.
6. The report of several referees, procured by the successful party to be signed by the referees separately, without their having come to any agreement on a report while together, is irregular, and should be set aside on this ground, although the party may have acted in good faith in procuring it. *N. Y. Superior Ct.*, 1870, *Townsend v. Glen's Falls Ins. Co.*, *Ante*, 97.
7. In causes referred to several referees, there must be a conference of all, and a substantial conclusion by a majority, embodied in a report made by them when they are together. *Ib.*
8. After the hearing of the cause before three referees, and a consultation in which a majority fail to agree upon a conclusion or any findings, two of them cannot make a report by signing separately their

REMOVAL OF CAUSES.

conclusions, nor can two, upon a conference, agree to a conclusion and make a report without a conference of all. *Ib.*

ATTORNEY AND CLIENT, 3; COUNTY COURT, 2; PARTITION.

RELIGIOUS CORPORATIONS.

1. The distinction between the powers of a religious corporation and other corporations, as to alienating lands, is that the former must obtain the consent of the court. *Brooklyn City Ct.*, 1871, Congregational Beth Elohim *v.* Central Presb. Ch., *Ante*, 484.
2. The object of the statute is to protect the corporators from the perversion of the property. The granting of the land is the act to which the statutory restraint is directed. *Ib.*
3. The statute does not prohibit a religious corporation from making, without such consent, an executory contract of sale preliminary to conveyance; and it is sufficient if the consent be obtained after the contract, and before the time of conveying the property. *Ib.*
4. The contract need not expressly provide that such consent shall be obtained. *Ib.*
5. Such a condition may be implied, and there having been no breach of trust, nor intent to evade the statute, the contract is not *ultra vires*. *Ib.*
6. The trustees of a religious corporation, in carrying out a contract for the sale and conveyance of its property, have incidental power to agree to an extension of the time for delivery of the deed. *Ib.*

REMOVAL OF CAUSES.

1. Under the Act of Congress of July 27, 1868,—providing for the removal by corporations, &c., of suits brought against them, from State courts to United States circuit or district courts, upon verified petition, stating a defense, arising under the United States Constitution, &c.,—the truth of defendants' averment that they have such a defense, must be settled at the trial, and cannot be tried on affidavits. *U. S. Circ. Ct.*, 1871, *Fisk v. Union Pacific R. R. Co.*, *Ante*, 457.
2. Where there are several defendants, they need not all join at the time of presenting the petition, but each, or as many as see fit, may, without waiting for others, present the petition and otherwise comply with the requirements of the act. *Ib.*
3. No affidavits in opposition can be read before the State court. The application on the petition is *ex parte*, and depends on the papers upon which it is founded; and if they are regular and sufficient, the court has no discretion. *Ib.*

SERVICE (AND PROOF OF).

4. When one or more of the defendants have presented a petition, under that act, and thus initiated the removal, it is not competent for the State court to take any proceedings in the cause, other than to perfect the removal, as other parties defendant may appear and present their petition. *Ib.*
5. The joinder, as defendants in the suit, of persons who are not within the limitation prescribed by that act, with those who are, cannot be permitted to withdraw the cause from the jurisdiction of the federal courts. *Ib.*

RESIDENCE.

ARREST, 5.

SALE.

1. A purchaser of chattels, to whom the seller has delivered them with intent to pass the title, although the purchaser procured the delivery by fraud, can convey a good title to a *bona fide* purchaser for value. *Com. of App.*, 1871, *Paddon v. Taylor, Ante*, 370.
2. The surrender by the latter, of the fraudulent purchaser's promissory note, given for money loaned, equal in amount to the value of the chattels sold, is a good consideration, and makes the sale valid against the original seller, within this rule. *Ib.*

SEARCH WARRANTS.

May be issued by justices, &c., for violation of game law. *Laws of 1871*, ch. 721.

SERVICE (AND PROOF OF).

1. Forms of proceeding by substituted service under *Laws of 1853*, p. 974, at defendant's *place of business*, where he evades personal service, and his *residence* is not known; and forms of proof of such service, and of attachment,—*Held*, sufficient. *N. Y. Com. Pl.*, 1869, *Baker v. Stephens, Ante*, 1.
2. The judge to whom the application for an order for substituted service is made, being satisfied that all requirements of the statute, necessary to confer jurisdiction, have been complied with, may make the order; and having been made, it cannot be questioned collaterally, as for instance upon a motion to vacate an attachment which was issued thereon, and which recites all the necessary jurisdictional facts. *Ib.*
3. It is competent for the court, on appeal in such case, to take cognizance of the fact that the conditions necessary to confer jurisdiction

SHERIFF.

recited in the attachment really did exist, though not set forth in the moving affidavits. *Ib.*

4. The summons for the commencement of an action of an equitable nature, under the Code of Procedure, may, by virtue of the former practice in chancery, be served by publication, on an absent defendant, who has property within the State. *Supreme Ct. Chambers*, 1866, *Lefferts v. Harris*, *Ante*, 2, *note*.
5. Service of a notice of appeal, on one member of the board of commissioners of excise of a county, is not service on the board. Any number of the members less than the whole do not constitute the board of excise; and a service to be on a board of excise, must be on every member thereof, to confer jurisdiction upon the appellate court to hear the appeal. A board of excise, like overseers of the poor, commissioners of highways, &c., is not an artificial body, like a corporation, but a *quasi* corporation only. *Supreme Ct.*, 1870, *Metcalf v. Garlinghouse*, 40 *How. Pr.*, 50.

SET-OFF.

An agreement made in contracting a debt, that a part shall be applied in satisfaction of a prior cross indebtedness, and the residue shall be paid and not so applied, does not prevent the right of the debtor to have the whole set off, when sued for the residue. [15 *Wend.*, 51; 1 *East*, 375; 2 *Maule & S.*, 510; 9 *Dowl. & R.*, 35; *Barb. on Set-off*, 93, 137; 9 *Pars. on Cont.*, 249; 1 *Wait's L. & Pr.*, 966.] *Supreme Ct.*, 1870, *Gutchess v. Daniels*, 58 *Barb.*, 401.

SHERIFF.

Sheriff's fee bill for all the counties except New York, Kings, and Westchester.

1. For the following services hereafter* done and performed by the sheriffs of the counties of this State, except in the counties of New York, Kings and Westchester, the following fees shall be allowed.
 - (1) For serving a summons, *complaint* or any other paper *issued in any action, the sum of one dollar*; and for necessary travel in making such service, the sum of six cents per mile to *and from the place of service*, to be computed in all cases from the court-house of the county, and if there are two or more court-houses, to be computed from that nearest to the place of service.
 - (2) For taking a bond of a plaintiff in *proceedings for the claim and delivery of personal property*, or for taking a bond from either the plaintiff or defendant, or any other party, in any case where he is authorized to take the same, the sum of *fifty cents*.
 - (3) For a certified copy of *every* such bond, twenty-five cents.
 - (4) For serving an attachment for the payment of money, or an execution for the collection of money, or a warrant for the same purpose issued by the comptroller or by any county treasurer, for collecting

* The act passed and took effect April 12, 1871.

SHERIFF.

the sum of two hundred and fifty dollars or less, *three cents* per dollar; and for every dollar collected more than two hundred and fifty, the sum of two cents. For mileage on every execution, the sum of ten cents per mile for going only, to be computed from the court-house. For receiving and entering such execution on their books and searching for property, the sum of fifty cents; which sum shall be a charge against and to be collected of the person by whom the said execution was issued, except when he is a county clerk, or of the person in whose favor the judgment was rendered, except as is otherwise hereinafter provided. The said sum of fifty cents in the case of judgments hereafter recovered shall be one of the disbursements to be included in the bill of costs taxed in favor of the party entitled thereto. In cases where judgment has been already obtained, the said sum shall be collected by the sheriff from the defendant in the execution in the same manner as his other fees are now collected. The fees allowed by law and paid by such sheriff to any printer for publishing an advertisement of the sale of real estate for not more than six weeks, and for continuing such advertisement more than six weeks, or for publishing the postponement of any such sale, the expense of such continuance or postponement shall be paid by the party requiring the same. The fees herein allowed for the service of an execution, and for advertising thereon, shall be collected by virtue of such execution in the same manner as the sum therein directed to be levied; but when there shall be several executions against the defendant at the time of advertising his property in the hands of the same sheriff, there shall be but one advertising fee charged on the whole, and the sheriff shall elect on which execution he will receive the same.

- (5) For drawing and executing a deed pursuant to a sale of real estate, *two* dollars, to be paid by the grantee in such deed.
- (6) For serving a writ of possession, *assistance* or of restitution, putting any person entitled into the possession of premises, and removing the tenant, one dollar and *fifty* cents; and the same compensation for traveling to serve such writ as is herein allowed on the service of a *summons*.
- (7) For taking a bond for the liberties of the jail, *one dollar*. Summoning a jury upon a writ of inquiry, or in any case where it shall become necessary to try the title to any personal property, attending such jury, and making and returning the inquisition, *two* dollars and fifty cents. *For summoning a jury in pursuance of the warrant or precept of commissioners appointed to inquire concerning the lunacy, idiocy or habitual drunkenness of any person, for each juror summoned, the sum of twenty-five cents; for attending such jury when required, one dollar. For summoning a jury in any case not hereinbefore mentioned, one dollar; and for attending such jury when required, one dollar.*
- (8) Attending before any officer with a prisoner for the purpose of having him surrendered in exoneration of his bail, or attending to receive a prisoner so surrendered, who was not committed at the time, and receiving such prisoner into his custody, in either case, *one* dollar.
- (9) For attending a view, two dollars per day, and for going and returning, eight cents for each mile actually traveled.
- (10) For serving an attachment against the property of a debtor

STAY OF PROCEEDINGS.

under the provisions of chapter five of the second part of the *Revised Statutes*, or against a ship or vessel under the provisions of the eighth title of chapter eight of part third thereof, *one dollar*, with such additional compensation for his trouble and expenses in taking possession of and preserving the property attached as the officer issuing the warrant shall certify to be reasonable; and when the property so attached shall afterward be sold by the sheriff, he shall be entitled to the same poundage on the sum collected as if the sale had been made under an execution. For making and returning an inventory and appraisal, such compensation to the appraisers, not exceeding one dollar to each per day for each day actually employed, as the officer issuing the attachment shall allow, and *twenty-five cents per folio for drafting, and twelve and a-half cents per folio for copying, the inventory.* For selling any property so attached and for advertising such sale, the same allowance as for sales on execution.

- (11) For attending any term of the supreme court or of the county court of any county, per day, three dollars. *Laws of 1871*, ch. 415, § 1.
2. All provisions of former acts fixing compensation for above services, and inconsistent with the provisions hereof, are hereby repealed.* *Id.*, § 2.

IMPRISONMENT, 4; LIMITATION OF ACTIONS, 4.

SLANDER.

An action lies by a woman, married or single, for words spoken (after March 29, 1871) imputing unchastity; and without alleging or proving special damage. A married woman may sue therefor alone, and the recovery is her separate property. *Laws of 1871*, ch. 219.

SPECIAL PROCEEDINGS.

CERTIORARI,

STATUTES.

Of two statutes affecting the same subject and enacted the same day, the one bearing the higher number as a chapter of the laws, being a local act, and by its terms intended to take effect at a later day than the other,—*Held*, to control the other. *N. Y. Com. Pl.*, Metropolitan Board of Health *v.* Schmades, *Ante*, 205.

STATUTE OF LIMITATIONS.

STAY OF PROCEEDINGS.

Where plaintiff fraudulently makes way with evidence of defendant

* The provisions superseded are those of 2 Rev. Stat., 644, *Laws of 1830*, ch. 320, *Laws of 1850*, ch. 225. The changes are indicated by italics.

SURPLUS MONEYS.

ent's rights, material to the action, his proceedings may be stayed until he shall produce it. *N. Y. Superior Ct.*, 1870, *Premo v. Smith, Ante*, 90.

APPEAL, 11.

STIPULATION.

APPEAL, 11.

SUBSTANTIAL RIGHT.

APPEAL, 6.

SUPPLEMENTARY PROCEEDINGS.

1. Form of affidavit for examination supplementary to judgment, *Held*, sufficient. *Baker v. Stephens, Ante*, 1.
2. An order for the supplementary examination of a judgment debtor in the New York common pleas cannot issue on a return of execution made by a marshal. *N. Y. Com. Pl. Sp. T.*, 1860, *Silverman v. Henant, How. Pr.*, 88.
3. The act of 1865 (ch. 400, § 3), conferring certain powers upon marshals, concurrent with the sheriff, applies only to proceedings *before* execution, and not to any supplementary proceedings. Section 292 of the Code, which provides that executions shall be issued to, and returned by, the sheriff of the county where the debtor resides, or where the judgment roll, or a transcript of the judgment, is filed, is, therefore, still in full force and effect, and was not amended by the act of 1865. *Ib.*
4. A creditor, by taking, on supplementary proceedings, a note held by his debtor, does not ratify the transaction on which it was given, so as to estop him from availing himself of fraud in such transaction as a ground of disaffirming it. *Supreme Ct.*, 1870, *Briggs v. Merrill*, 58 *Barb.*, 389.
5. A creditor having taken supplementary proceedings may, before appointment of a receiver, abandon them, and commence a creditor's suit. [Reviewing cases.] *Supreme Ct.*, 1871, *Bennett v. McGuire*, 58 *Barb.*, 625.

SUPREME COURT.

Appointments or general terms provided for. *Laws of 1871*, ch. 768.

CERTIORARI; SURROGATES' COURTS, 7.

SURPLUS MONEYS.

FORECLOSURE.

TENDER.

SURROGATES' COURTS.

1. Election of surrogates, and cases where a surrogate is precluded from acting, from interest, affinity, &c., or service as witness or counsel,—provided for, by *Laws of 1871*, ch. 859.
2. Bonds of surrogates regulated. *Laws of 1871*, ch. 239.
3. Provision for employment of stenographers. *Laws of 1871*, ch. 874.
4. The surrogate may require testamentary trustees or guardians to give security, as executors, &c. *Laws of 1871*, ch. 482, amending 2 *Laws of 1867*, p. 1926, ch. 782.
5. An allowance of the costs of contest to an unsuccessful contestant of the probate of a will,—though authorized by the act of 1870, relating to the surrogate's court in the county of New York,—should only be granted in exceptional cases. *N. Y. Surr. Ct.*, 1871, Taylor Will Case, *Ante*, 300.
6. “Appeals, when taken from the decree or decision of a surrogate's court declaring the validity of a will, and admitting the same to probate, shall not stay the issuing of letters testamentary to the executors, if in the opinion of the surrogate the protection and preservation of the estate of the deceased require the issuing of such letters, but such letters shall not confer power upon the executor or executors named in the will to sell real estate, pay legacies, or distribute the effects of the testator, until the final determination of such appeal.” *Laws of 1871*, ch. 603, § 1.
7. “Such appeals shall have preference for hearing in the supreme court and in the court of appeals, in the same order as is now prescribed by law in cases where the issuing of letters testamentary is stayed.” *Id.*, § 2.

TAXES.

The assessors have no power to assess a person after they have completed their roll for review, or on the day fixed for review; nor on their transferring an assessment on real estate from the former owner to a purchaser, to assess the former owner for personal estate; and if they so do, they act without jurisdiction, and are liable to an action by him. *Supreme Ct.*, 1871, *Clark v. Norton*, 58 *Barb.*, 434.

TENDER.

Objections which might be obviated,—such as that the order of court allowing a religious corporation, which was the vendor, to make the sale, had not been filed,—if relied on to sustain a refusal of a tender of the deed, must be specified at the time of the refusal. *Brooklyn City Ct.*, 1871, *Congregation Beth Elohim v. Central Presb. Ch.*, *Ante*, 484.

TRIAL.

TRADEMARKS.

1. In the law of trademarks there is no distinction between artificial products and those which are natural and spontaneous. Where a spring having peculiar medicinal and curative properties, had been known as "The Congress Spring" for more than seventy years, and that name had never been applied to any other spring or any other water, and no other spring possessed the same qualities;—*Held*, that the words "Congress Water" and "Congress Spring Water," appropriately indicated the origin of the water flowing from the spring in question; and that the proprietors of the spring had an exclusive right to the use of the word "Congress" as their trademark, in connection with the sale of such water. *Ct. of App.*, 1871, Congress & Empire Spring Co. v. High Rock Congress Spring Co., *Ante*, 348.
2. A sale of the spring carries to the purchaser the right to use the trademark; and in an action by the purchaser to enjoin third persons from infringing, the complaint need not allege any express assignment of the trademark. *Ib.*

TRESPASS.

LIMITATIONS OF ACTIONS.

TRIAL.

1. An irregularity in the formation of a jury, which does not prejudice the rights of the party,—e.g., substituting a juror of the same name, in the place of one drawn, who did not appear, or the incapacity of a juror from alienage, not objected to at the trial,—is not ground for disturbing the verdict. *Supreme Ct. Sp. T.*, 1870, *Bennett v. Matthews*, 40 *How. Pr.*, 428.
2. If the cause was at issue so as to be triable, the terms on which the court required trial,—e. g., without notice,—are not grounds of reversal on appeal. *Supreme Ct.*, 1871, *Oneida National Bank v. Stokes*, 58 *Barb.*, 508.
3. Actions against sheriffs in official capacity, in courts of record, after issue, have preference over other cases at issue not now entitled to preference by law. *Laws of 1871*, ch. 733.
4. In an action on a promissory note, if the answer admits its making and delivery, and sets up an affirmative defense, the defendant is entitled to open and close, on the trial, although the answer deny the other allegations of the complaint; and the refusal of the court or referee to allow him to do so, is error for which a new trial will be awarded. *Supreme Ct.*, 1871, *Lindsley v. European Petroleum Co.*, *Ante*, 107.

VENDOR AND PURCHASER.

5. Where the plaintiff's evidence, in an action on a life policy, which was defended on the ground of alleged forfeiture by non-payment of premium, showed that the premium was, in fact, paid, after default, to a person employed by the company, and who was commonly sent to collect premiums, and was accustomed to sign receipts therefor;—*Held*, that the question whether he was authorized by the company to waive the forfeiture should have been submitted to the jury. *Supreme Ct.*, 1871, *Kolgers v. Guardian Life Ins. Co.*, *Ante*, 176.
6. To direct a verdict for defendants in such a case is error. *Ib.*
7. In an action by a wife to recover for a levy of an execution against her husband, on property claimed by her, it appearing that the business was carried on ostensibly by the husband, but it being alleged that the capital was wholly furnished by the wife, and he received no compensation except board and clothing, the question of fraudulent intent in such an arrangement is one for the jury. *Brooklyn City Ct.*, 1871, *O'Leary v. Walter*, *Ante*, 439.
8. The actual ownership is first to be determined in such cases, and then (if found to be in the wife), whether the management has been such as to estop her from asserting her ownership as against the husband's creditors. *Ib.*
9. In such cases the husband's course of conduct in the management of the business is a proper subject of investigation, and evidence on that point is admissible. *Ib.*
10. It is a mistrial to direct a verdict for plaintiff subject to the opinion of the court, if defendant has taken exceptions to the admission of evidence. *Supreme Ct.*, 1870, *Briggs v. Merrill*, 58 *Barb.*, 389.
11. But if defendant without argument submits points on the appeal which make no reference to the exceptions, he will be deemed to have waived the exceptions, and the objection is not ground for reversal. *Ib.*
12. On an indictment for murder, testimony as to provocation and danger,—*Held* to make it a question of fact for the jury whether the homicide were not justifiable. *Burdick v. People*, 58 *Barb.*, 51.

ARREST, 8; JURY; QUESTIONS OF LAW AND FACT; WITNESS.

VENDOR AND PURCHASER.

In a vendor's action on a note given by the purchaser for purchase money, at the time of making the executory contract of sale, and of even date therewith, the note and contract may be read together; and if the payment of the note so regarded is conditioned on performance by the vendor, he should not be allowed to recover if

WILL

wrongfully in default. *Supreme Ct.*, 1870, *Divine v. Divine*, 58 *Barb.*, 264.

VERDICT.

TRIAL.

VERIFICATION.

1. A verification of an answer, stating that the same "is true, except as to the matters therein stated," &c., is insufficient, and judgment may be entered as upon failure to answer. *N. Y. Com. Pl.*, 1871, *Sexaner v. Bowen*, *Ante*, 335.
2. It is not necessary that the precise language of the Code (§ 157) should be used, but the verification must be to the effect that the pleading is true *to the knowledge* of the affiant. *Ib.*

UNDERTAKING.

1. No expressed consideration is necessary to the validity of a statutory undertaking; the statute creates the liability. *N. Y. Com. Pl. Sp. T.*, 1870, *Johnson v. Ackerson*, 40 *How. Pr.*, 222.
2. Where the condition of an undertaking is "to pay any amount that may be awarded," it is an original obligation, which becomes absolute on award of judgment, and the plaintiff is not bound to exhaust his remedy against the judgment debtor, before bringing suit upon such undertaking. *Ib.*

WAIVER.

1. The rules of an insurance company, and the terms of a policy issued by it, may be waived by the ordinary custom of its office in dealing with its patrons. *Supreme Ct.*, 1871, *Kolgers v. Guardian Life Ins. Co.*, *Ante*, 176.
2. The receipt by insurers, through their general agent, of renewal premiums, taken by him with knowledge of other insurance on the same property, is a waiver of the requirement of the policy that formal notice of any such insurance must be given, and an indorsement made on the policy. *Ct. of App.*, 1868, *Carroll v. Charter Oak Ins. Co.*, *Ante*, 166.

INSURANCE.

WILL.

1. Upon probate of a will contested in respect to the genuineness of the paper offered, the testamentary capacity of the decedent, and the freedom of the act, the contestant's evidence as to the genuine-

WITNESS.

ness should first be received, and that relating to capacity and undue influence, successively afterward. *N. Y. Surr. Ct.*, 1870, Taylor Will Case, *Ante*, 300.

2. It is proper to allow the contestant an examination of private papers of deceased in the administrators' hands, bearing on the personal relations involved in the issues; family letters being first submitted to the court to determine their relevancy, before disclosing their contents by putting them in evidence. *Ib.*
- 3: The proponents of a will are not required, after having made a *prima facie* case, to produce all their cumulative evidence before any evidence has been given by the contestants. *Ib.*
4. The statute (*Laws of 1837*, ch. 460, § 17) authorizes the surrogate, in his discretion, to require the persons who have had possession of the will since its execution, to be examined; but not the lawyer who drew the will. *Ib.*
5. The rule that declarations of the testator, made subsequent to the date of execution, are inadmissible, does not justify the exclusion of such declarations, when offered strictly as corroborative evidence in respect to the genuineness of the signature, or the freedom of testator from undue influence, and its rebuttal of contestant's evidence on those points. *Ib.*
6. To give weight to the testimony of experts in handwriting against the genuineness of the signature to a will, it must be supported by strong corroborative proof of the mental condition of testator, the physical conditions under which he wrote, the state of bodily health, and the like. *Ib.*
7. Photographic copies of a signature are not admissible to aid an expert as a basis of opinion as to the genuineness of the original signature. Opinions of those acquainted with the handwriting in question, formed from an examination of photographic copies of the signature, are entitled to but little weight.
8. Photographs of signatures should not properly be resorted to as a means of evidence, without investigating the refractive power of the lens, the angle at which the original was inclined to the sensitive plate, the accuracy of the focusing, the skill of the operator, and the method of procedure; and if the photograph were an absolutely perfect reproduction of the original signature, there would be no necessity for the study of the reproduction if the original could be produced. *Ib.*
9. Detection of counterfeits and forgeries distinguished. *Ib.*

WITNESS.

1. State board of commissioners of public charities and managers of

WITNESS.

asylums, hospitals, &c., appointed by the governor and senate or by the legislature may subpoena witnesses in investigating complaints. Fees fixed. *Laws of 1871*, ch. 699.

2. The execution of an instrument under seal must be proved by the subscribing witness, if there be one, notwithstanding the present rule allowing parties to be witnesses; and proof of due diligence, such as would be used by a prudent man, in a sincere search for the witness, is still necessary, to let in secondary proof. *N. Y. Superior Ct.*, 1870, Hodnett *v.* Smith, *Ante*, 86.
3. Mere testimony of a third person, that, on information from a friend of the witness, he believes the witness has gone abroad, is not enough. *Ib.*
4. Testimony of husband not competent against wife and her assignor. [56 Barb., 185; 40 N. Y., 221.] *Bennett v. McGuire*, 58 Barb., 625.
5. Testimony of a defendant in an action by administrators, identifying his own letters to the intestate, which related to the subject of the action, is incompetent, because relating to a transaction and a communication with a deceased person, within section 399 of the Code of Procedure. The restriction applies to written as well as to verbal communications. *Supreme Ct.*, 1870, Ressegue *v. Mason*, 58 Barb., 89.
6. Two witnesses contradicting each other as to whether one of them had given certain notice to the other, it is not error to charge the jury that the one could not have truly sworn he gave the notice, unless he recollects giving it; and that, if he did not recollect it, he had committed perjury. *Ct. of App.*, 1868, Carroll *v. Charter Oak Ins. Co.*, *Ante*, 166.
7. Where the prisoner offers his own testimony, in his own behalf, evidence of his general bad character is admissible, to impeach him, as in the case of any other witness. *Supreme Ct.*, 1870, Burdick *v. People*, 58 Barb., 51.

DEPOSITION; EVIDENCE, 5, 8, 9; WILL.

THE END.

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